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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 393

THE GENERAL TIRE & RUBBER COMPANY,
Petitioner,

vs.

THE HONORABLE R. DORSEY WATKINS, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND,
Respondent.

THE FIRESTONE TIRE & RUBBER COMPANY,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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IN THE

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THE GENERAL TIRE & RUBBER COMPANY,
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vs.

THE HONORABLE R. DORSEY WATKINS, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND,
Respondent.

THE FIRESTONE TIRE & RUBBER COMPANY,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner, The General Tire & Rubber Company, prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case June 20, 1966.

CITATIONS TO OPINIONS BELOW.

There is no formal opinion of the District Court. The District Judge remained silent concerning his qualification, even though the decision in *Rapp* v. *Van Dusen*, 350 F. 2d 806 (3rd Cir. 1965) was twice called to his attention. In

answer to the petition for writ of mandamus in the Court of Appeals, however, Judge Watkins did express an opinion concerning his qualification. The answer is printed in Appendix B, *infra*, p. 11a. The Order and opinion of the Court of Appeals, not yet reported, are printed in Appendix B, *infra*, p. 3a.*

JURISDICTION.

The Order of the Court of Appeals was dated and entered June 20, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether the Court of Appeals denied due process of law in denying relief to petitioner when it found the practice petitioner complained of to be undesirable and tainted with the appearance of impropriety and when it amended its Rules of Practice *in futuro* as a result of petitioner's complaint.

2. Whether a judge has been "of counsel" or is "so related to or connected with" a party or his attorney as to be disqualified, within the prohibitions of 28 U. S. C. Section 455, from presiding over a litigation when:

(a) He has counsel for a party litigant as his counsel in a mandamus proceeding directly arising from the litigation;

(b) He collaborates, ex parte, with this counsel concerning the judge's and the party's mandamus

---

* Throughout this petition, Appendix A, B, C, D, E, p. .... will refer to the appendices attached to the petition; App. .... will refer to petitioner's main appendix attached to its petition in the Court of Appeals; and Supp. App. .... will refer to petitioner's supplemental appendix attached to its "Reply to Respondent's Answer" in the Court of Appeals.

responses on matters involving the merits of the litigation; and

(c) He attempts to obtain interlocutory review of an affidavit of prejudice on his own initiative, with the ex parte collaboration of counsel for one party.

3. Whether the inability of the excluded party to effectively examine or cross-examine concerning the collaboration set out in Question 2, the circumstances of which are within the personal knowledge of the judge and the included party and which were or may have been determinative of the question whether the judge should be disqualified under 28 U. S. C. 455, is a deprivation of due process within the doctrine of *In Re Murchison,* 349 U. S. 133 (1955).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED.

The constitutional provisions, statutes, and rules involved are Amendment V, Constitution of the United States; Sections 47, 144, and 455 of Title 28, U. S. C.; and Rule 31, Rules for the United States Court of Appeals for the Fourth Circuit. These provisions are set out in Appendix A, *infra,* p. 1a.

STATEMENT OF THE CASE.

A. Chronological Background.

The General Tire & Rubber Company is the owner of United States Patent No. 2,964,083, applied for in 1950, but not issued until December 13, 1960. The patent covers a revolutionary invention relating to pneumatic tires and tread stock. The industry-wide exposure for infringement has been estimated by General Tire's opponents to be in the vicinity of six million dollars per year (App. 4).

General Tire brought suits for infringement December

13, 1960, against The Goodyear Tire & Rubber Company and United States Rubber Company in the Northern District of Ohio (Cleveland). On March 17, 1961, a meeting was held between counsel for Goodyear, U. S. Rubber, and The Firestone Tire & Rubber Company. A handwritten memorandum of this meeting prepared by counsel for Firestone, Mr. Edward S. Irons, reveals that Firestone was asked by counsel for U. S. Rubber, Mr. Theodore S. Kenyon, to start a "backfire" for the Cleveland litigation (App. 6). On March 30, 1961, thirteen days after Mr. Kenyon's request, Firestone brought a declaratory judgment suit against General in the District of Maryland (Baltimore), *The Firestone Tire & Rubber Company and McCreary Tire & Rubber Company* v. *The General Tire & Rubber Company*, Civil Action No. 12,932. This is the parent litigation which gives rise to this petition. A consent decree of July 18, 1966 terminated the litigation as to McCreary.

Mr. Irons' memorandum of the March 17, 1961 meeting also reveals that it was feared that any "backfire" suit would be transferred to Ohio. On May 9, 1961, Mr. Harold J. Birch, attorney for Firestone and McCreary and partner of Mr. Irons, called Mr. Harry C. McCreary, Sr., President of McCreary Tire & Rubber Company. Appendix D, p. 42a. Appendix D is the transcript of a recording of this telephone conversation, made by Mr. McCreary and admitted to be authentic by Mr. Birch at a hearing held April 26, 1966, before Judge Watkins. (See also, Appendix D, pp. 42a, 47a). Mr. Birch told Mr. McCreary that General was "probably trying to line up to say in the long run that McCreary can be transferred out because they are just Firestone's little patsy, and Firestone is paying the whole bill." Mr. Birch then stated that:

> ". . . with full recognition that the agreement that was made between you [Mr. McCreary] and Stanley Clark [Patent Counsel for Firestone] is not going to, in the long run, change one tiny little bit. I don't want

to put anything in the mail, and I don't want to talk about it too much, for obvious reasons.

• • • • •

"So what we would like to do would be to formally bill you folks for 1 per cent of the cost of this litigation. . . ."

• • • • •

"Bearing in mind that . . . after this is all over with, why, everything will come out in the wash."

• • • • •

"So we don't want to leave any stone unturned in case they should file an interrogatory and ask McCreary if they are paying their toll in this lawsuit."

General's first motion to dismiss or transfer the Baltimore case to Cleveland for consolidation with the suits against Goodyear and U. S. Rubber was filed April 13, 1961 and heard and denied July 6, 1961. The July 6, 1961 decision also enjoined prosecution by General of suits filed in Ohio against Firestone and McCreary after March 30, 1961. At the hearing on the first motion to transfer, Appendix E, p. 48a, Mr. Irons, appearing as attorney for Firestone and McCreary, represented to the Court that:

"He [McCreary] comes here jointly as plaintiff with Firestone, but other than that, independent, he pays my bills as I send them to him. . . ."

• • • • •

"He [McCreary] can, perhaps, derive some benefit from his association with Firestone, but he comes here independently, and not as Firestone's agent or cat's paw, and I think that should be clearly understood."

The inconsistency between the Birch-McCreary telephone conversation and Mr. Irons' representations to the Court

comprise part of the fraud referred to in Section III of the Court of Appeals' opinion.*

A second motion to transfer the Baltimore case was brought September 6, 1963, a major ground for transfer being that the Baltimore case was being used for the sole purpose of disrupting the Cleveland litigation. There was insufficient positive proof of this assertion at that time, however, since the "backfire" memorandum of Mr. Irons was not produced until October, 1965, and the Birch-McCreary telephone recording was not revealed until April 18, 1966, at which time Messrs. Irons and Birch were removed as McCreary's attorneys and replaced by Mr. Walter J. Blenko, Jr. Mr. McCreary, Sr. had died earlier. The second transfer motion was denied October 14, 1963.

General filed a petition for writ of mandamus relating to the denial of the second transfer motion. This petition was argued November 11, 1963 and denied January 7, 1964, 326 F. 2d 926 (4th Cir. 1964), *cert. denied,* 377 U. S. 909 (1964).

An affidavit of personal bias and prejudice was filed against Judge Watkins on November 20, 1963, and denied November 22, 1963. *Firestone Tire & Rubber Co.* v. *General Tire & Rubber Co.,* 140 U. S. P. Q. 124. At that time, such a ruling was not considered subject to mandamus and was understood by all to be reserved for appeal.

On January 24, 1964, a General Tire motion for a jury trial was denied. A petition for writ of mandamus to compel trial by jury was denied March 31, 1964, 331 F. 2d 192 (4th Cir. 1964), *cert. denied,* 377 U. S. 952 (1964).

Trial of the Baltimore case commenced April 15, 1964, on a 4-day per week schedule. The trial has not been stayed

* The motion suggested in the opinion, Appendix B, p. 10a, was made June 28, 1966. Over petitioner's objections, Firestone was given until September 6 to answer. Petitioner was given only until September 13 to reply and argument was set for September 19. Petitioner also moved on July 11 to stay the trial, now set to resume October 3, 1966, until determination of the motion to transfer. That motion was set over to be heard September 19.

pending decision on this petition, and we cannot forecast when trial will be concluded.

B. Facts Giving Rise to This Petition.

1. The Transfer Mandamus.

Benjamin C. Howard, Esq., active counsel for Firestone and, until April, 1966, for McCreary, was engaged by Judge Watkins as his counsel on the transfer mandamus petition (Appendix B, p. 12a) even though it was customary to have only the U. S. Attorney work with the judge on mandamus petitions (Appendix B, p. 12a). Mr. Howard prepared the judge's response to the petition (Appendix B, p. 12a), then adopted the "judge's" response as a part of Firestone's intervening brief, also signed by Mr. Howard, this time in his role as counsel for Firestone (Supp. App. 8). Mr. Howard also argued for Judge Watkins before the Court of Appeals (Supp. App. 2), where he stated he was "appearing only for Judge Watkins," was speaking "for Judge Watkins," and was "authorized" to state a certain opinion for Judge Watkins (Supp. App. 2, 5; Appendix B, p. 12a).

2. The Jury Trial Mandamus.

Judge Watkins again obtained Mr. Howard as his counsel on the jury trial mandamus (Appendix B, p. 13a). Mr. Howard appears as "Attorney for Respondent" on the judge's response to the mandamus petition (App. 3). Judge Watkins at first stated (App. 11, 13), then later retracted the statement, that Mr. Howard and the U. S. Attorney had prepared a draft brief for the judge in response to the petition (Appendix B, p. 13a). It is not disputed, however that there was collaboration between the judge and Mr. Howard in connection with the response (Appendix B, p. 14a) and that the judge, in his response, did request the Court of Appeals to "consider and pass upon the adequacy

of the affidavit of personal bias and prejudice" (App. 2). The Court of Appeals held the judge's request was not properly raised by mandamus (331 F. 2d 192, 198, *supra*). In regard to the collaboration between Judge Watkins and Mr. Howard, petitioner pointed out to the Court of Appeals, at page nine of its "Reply to Respondent's Answer," that only two days after the judge requested a decision on the affidavit of prejudice, Mr. Howard signed a lengthy brief for Firestone devoted to an attack on the merits of the affidavit. General and its counsel knew nothing of these collaborations.

3. District Court Proceedings Relative to This Petition.

The decision in *Rapp* v. *Van Dusen,* 350 F. 2d 806 (3rd Cir. 1965) appeared in the Advance Sheets of the Federal Reporter, November 1, 1965. On November 18, 1965, General called this case to Judge Watkins' attention and requested he consider it. In view of the 1948 deletion of the words "on application by either party" from 28 U. S. C. Section 455, General believed this action was all that was necessary or indeed proper to obtain a ruling from the judge concerning his qualification to sit. Judge Watkins remained silent.

On December 16, 1965, General again brought up *Rapp* v. *Van Dusen,* and when the judge again remained silent as to his ruling on qualification, General requested the judge's comments on whether there were ex parte contacts with Mr. Howard. The establishment of ex parte conferences was thought necessary for the application of *Van Dusen* to the present case. Judge Watkins did provide the evidence of ex parte collaboration with Mr. Howard, though his disclosure of the facts was then and since has been sketchy at best (App. 9; Appendix B, p. 11a). When the December 16, 1965 colloquy resulted in no mention of *Van Dusen* by the judge, General perceived its only course of remedy to be mandamus.

4. Court of Appeals Proceedings Relative to This Petition.

The instant petition for mandamus was filed January 4, 1966 and heard, *en banc,* February 7, 1966. On February 14, 1966, following announcement of the settlement of one of the Ohio cases, Judge Watkins advised the parties that Circuit Judge Sobeloff had contacted him and asked if there was any chance of Civil Action 12,932 being settled. Judge Watkins reported that he would explore the possibility of settlement. Judge Sobeloff asked to be kept advised of progress, since there was no need to write an opinion if the case were going to be settled. On February 24, 1966, Firestone reported that the Court of Appeals could proceed on the basis that there were no prospects of settlement. On May 26, 1966, General, having received no counter offer from Firestone to its offers of settlement, and becoming increasingly concerned over the delay in the mandamus decision, informed Judge Watkins there would be no settlement negotiations until after the opinion of the Court of Appeals. This information was orally communicated to Judge Sobeloff by Judge Watkins, and on June 20, 1966, the decision was announced.

The Court of Appeals denied the petition, but held that the practice of appointing counsel for one of the parties as the judge's counsel in mandamus proceedings and conferring with such counsel ex parte was undesirable and tainted with the appearance of impropriety. *Henceforth,* the Court held it would follow the *Van Dusen* decision. Rule 31 of the Court of Appeals was amended in the opinion to solve the problem in the future. The court declined to disqualify Judge Watkins, however, apparently at least partially on the grounds that no charge of personal prejudice was made against the judge. The Court's statement that petitioner "has disavowed any accusation of personal bias or prejudice in the Judge's conduct of the case" (Ap-

pendix B, p. 9a) is incorrect. The affidavit of prejudice remains in the case and will be relied upon in the event of appeal by General. Petitioner's position was stated at page 10 of its "Reply to Respondent's Answer." It was that for purposes of this mandamus, the "allegation of personal bias is not before the Court *at this time* . . . ." (Emphasis supplied.)

REASONS FOR GRANTING THE WRIT.

1. Petitioner Should Not Be Deprived of the Benefits of the Improved System of Justice Its Mandamus Petition Has Brought About.

The Court of Appeals stated (Appendix B, p. 8a) that it would henceforth follow the practice outlined in *Rapp* v. *Van Dusen, supra.* In fact, however, its decision is in direct conflict with the holding in *Rapp* v. *Van Dusen* and is in conflict with *Texaco, Inc.* v. *Chandler,* 354 F. 2d 655 (10th Cir. 1965). In *Rapp* v. *Van Dusen,* under almost identical facts, the Third Circuit *disqualified the District Judge.* In *Texaco* v. *Chandler,* a case decided under 28 U. S. C. 455, the Tenth Circuit likewise disqualified the judge. See Appendix C for the opinions in *Rapp* v. *Van Dusen* and *Texaco* v. *Chandler* (pp. 20a, 38a).

Petitioner does not quarrel with that part of the Court's decision which recognizes the wisdom of the Third Circuit's *Van Dusen* decision and sets up new procedures for the Fourth Circuit. The denial of the benefits of these new procedures to petitioner must not be left standing, however, if our system of justice is to continue its vitality.

Our system is improved, for the most part, from within the system, on a case-by-case basis. Landmark improvements are most often brought about by the complaints of litigants in lawsuits. If the complaint is found justified, the litigant is given relief and the system is that much

improved for all others in the future. *But it is the incentive of relief to the complainant that makes the system work.* Rapp received relief in *Rapp* v. *Van Dusen* and Texaco received relief in *Texaco* v. *Chandler*. Each decision improved the judicial procedures of its Circuit.

Because of the precedent of *Rapp* v. *Van Dusen*, General Tire was encouraged to seek relief in the Fourth Circuit. While General is interested in improving our system, it brought this mandamus action primarily to disqualify Judge Watkins. It would not have brought the action only to improve procedures in the Fourth Circuit. This is particularly true since the emotional effect upon a judge of an attempt to disqualify him is at best unpredictable. In the present case, this effect is compounded by the previously filed affidavit of prejudice. With precedent such as *General Tire* v. *Watkins*, what party will take the risk to challenge impropriety, real or in appearance, only to have the objectionable practice improved for the future but *not* for the complainant?

The recent confession cases of this Court are in point. *Miranda* v. *Arizona*, 34 U. S. L. Week 4521 (U. S. June 13, 1966) and *Johnson* v. *New Jersey*, 34 U. S. L. Week 4592 (U. S. June 20, 1966). In *Miranda*, the first petitioning party was held entitled to the remedy even though in *Johnson*, decided a week later, *Miranda* was not applied retroactively. *Miranda* was *in futuro* for others, but *ab initio* for Miranda.

The case should be summarily remanded to the Court of Appeals with instructions to apply to petitioner the benefits of the new practice petitioner brought about. Judge Watkins should be disqualified.

2. 28 U. S. C. 455 Is Ripe for Interpretation by This Court.

The Court of Appeals held that Judge Watkins was not disqualified by the prohibitions of 28 U. S. C. 455. In an extremely brief treatment of the issue considering the depth to which it was briefed, the Court stated Judge Watkins had not been "of counsel" within the prohibition of the statute because that statute "is directed primarily at the Judge who was of counsel in a case before his appointment to the bench" (Appendix B, p. 9a). No authority is stated for this conclusion. Neither the language of the statute, its legislative history, nor common sense indicates such a limitation should be placed on the statute. Judge Kalodner, concurring in *Rapp* v. *Van Dusen,* specifically held that Judge Van Dusen's conduct (which was not as involved as that of Judge Watkins) put him directly within the "of counsel" prohibitions of 28 U.S.C. 455.

In addition to the "of counsel" prohibition of 28 U.S.C. 455, petitioner also relied and relies upon the "so related to or connected with any party or his attorney" prohibition of the statute. The *Texaco* v. *Chandler* decision of the Tenth Circuit is in conflict with the Fourth Circuit's refusal to hold Judge Watkins disqualified under the "so related to" clause of the statute.

28 U.S.C. 455 is ripe for construction by this Court. Recently, four circuits, the Third, Fourth, Fifth, and Tenth have dealt with substantial questions of interpretation of 28 U.S.C. 455. *Rapp* v. *Van Dusen, supra;* the instant case; *Adams* v. *United States,* 302 F. 2d 307 (5th Cir. 1962); and *Texaco* v. *Chandler, supra.* Three of these decisions were *en banc* and two involved vigorous dissents.

Rapp v. *Van Dusen* created what promised to be a series of reform cases throughout the circuits and states. *Texaco* v. *Chandler* was decided only four months after *Van Dusen,* relying upon the decision with approval. Ten months after

Van Dusen, the Fourth Circuit relied upon it to change Fourth Circuit practice. At least one state Supreme Court has cited *Van Dusen* and *Chandler* with approval. *State ex rel. Anaya* v. *Scarborough*, 410 P. 2d 732 (New Mexico, 1966).

If the instant decision is allowed to stand, however, these and other reform decisions are likely to end, since no party will risk either the expense or the possible effect upon the trial judge if he cannot obtain the benefit of the changing practice for himself. By the same token, it is unlikely that other opportunities to construe 28 U.S.C. 455 will reach this Court.

That mandamus practice has been neglected in the past is apparent from the fact that the First, Second, Eighth, Ninth, Tenth and D.C. Circuits have *no* rules governing mandamus. This petition presents the Court with a rare opportunity to review mandamus procedures and construe *for the first time* the "of counsel" and "so related to" prohibitions of 28 U.S.C. 455, particularly in relation to ex parte collaboration between a judge and counsel for a party. As shown more fully in the briefs before the Court of Appeals, the petition also raises issues requiring construction of all three qualification statutes, 28 U.S.C. 47, 144 and 455.

3. In Re Murchison.

In Re Murchison, 349 U. S. 133 (1955) was extensively briefed, but not cited by the Court of Appeals. That decision is direct precedent for petitioner's contention that inability to effectively cross examine concerning the ex parte collaborations between Judge Watkins and an attorney for petitioner's opponents is a violation of the due process guaranteed by the Fifth Amendment of the Constitution.

Conclusion.

For the foregoing reasons, this petition should be granted and the case either (a) summarily remanded for disqualification of the District Judge under the Court's general supervisory powers or (b) remanded for disqualification under 28 U.S.C. 455, after hearing.

Respectfully submitted,

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FRANK J. EARNHEART,
Of Counsel.

July, 1966.

APPENDIX A.

Constitutional Provisions, Statutes and Rules Involved.

United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * * *

62 Stat. 872, 28 U.S.C. 47:

Disqualification of trial judge to hear appeal.—No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

* * * * * * *

63 Stat. 99, 28 U.S.C. 144:

Bias or prejudice of judge.—Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed

not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

* * * * *

62 Stat. 908, 28 U. S. C. 455:

Interest of justice or judge.—Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

* * * * *

Rule 31, Rules for the United States Court of Appeals for the Fourth Circuit:

Mandamus.

1. A petition for a writ of mandamus must be filed with the clerk. Upon the filing of the same the clerk shall docket the petition. It shall then be the duty of the petitioner or his counsel to present the petition in open court upon the convening thereof, on any morning, except Saturday.

* 2. Where the purpose of the writ is to review a decision of a District Judge, he will not be required to file an answer or submit a brief, and his failure to do so will not be deemed an admission of any allegation in the petition. Each prevailing party in the District Court will be treated as an intervenor and shall not be required to submit a formal motion to intervene.

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* This paragraph was added by amendment in the Court of Appeal's opinion. Appendix B, p. 8a.

APPENDIX B.

Opinions Below.

UNITED STATES COURT OF APPEALS,
For the Fourth Circuit.

No. 10,429.

THE GENERAL TIRE & RUBBER COMPANY,
Petitioner,

vs.

THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland,
Respondent.

FIRESTONE TIRE & RUBBER COMPANY and McCREARY TIRE & RUBBER COMPANY,
Intervenors.

ON PETITION FOR WRIT OF MANDAMUS OR PROHIBITION, OR BOTH.

THIS CAUSE came on to be heard on the petition for writ of mandamus or prohibition, or both, and upon the answer to the petition, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for writ of man-

damus, or prohibition, or both, be, and it is hereby, denied and dismissed.

SIMON E. SOBELOFF,
United States Circuit Judge.

Filed, June 20, 1966.

MAURICE S. DEAN,
Clerk.

UNITED STATES COURT OF APPEALS,
For the Fourth Circuit.

No. 10,429.

THE GENERAL TIRE & RUBBER COMPANY,
Petitioner,

vs.

THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland,
Respondent,

THE FIRESTONE TIRE & RUBBER COMPANY and McCREARY TIRE & RUBBER COMPANY,
Intervenors.

ON PETITION FOR WRIT OF MANDAMUS OR PROHIBITION, OR BOTH.

(Argued February 7, 1966. Decided June 20, 1966.)

Before HAYNSWORTH, *Chief Judge,* and SOBELOFF, BOREMAN, BRYAN and J. SPENCER BELL, *Circuit Judges,* sitting en banc.

SOBELOFF, *Circuit Judge:*

This is the third mandamus proceeding generated in this court by a patent dispute pending in the District Court between Firestone Tire and Rubber Company and McCreary Tire and Rubber Company, plaintiffs, against the

General Tire and Rubber Company, defendant. It is a petition for a writ of mandamus to disqualify Judge R. Dorsey Watkins under 28 U. S. C. A. sec. 455 (1958), on the ground that he was "of counsel" in the two prior proceedings.[1] For the reasons stated below, the petition is denied.

I.

Firestone and McCreary initiated the principal litigation in 1961 by instituting in the District Court an action for declaratory judgment against General Tire to invalidate certain patents owned by General Tire. The latter counterclaimed alleging infringement, and the parties engaged in extensive discovery proceedings. In October of 1963, General Tire moved to transfer the action to the District Court for the District of Ohio for consolidation with a similar case between General Tire and Firestone involving the same patent. Judge Watkins denied the motion, and General sought review in this court by its first petition for mandamus. After considering the briefs and arguments, we dismissed the petition, *General Tire and Rubber Co.* v. *Watkins,* 326 F. 2d 926 (4th Cir.), *cert. denied,* 377 U. S. 909 (1964). Counsel for Firestone and McCreary, the real parties in interest here, acted as counsel for Judge Watkins, the nominal respondent in the mandamus action.

In February of 1964, General filed a second petition for mandamus, this time to compel the District Judge to order a jury trial. Again we denied the application, *General Tire and Rubber Co.* v. *Watkins,* 331 F. 2d 192 (4th Cir. 1964), and the Supreme Court denied certiorari. 377 U. S. 952

1. "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

(1964). In that proceeding the District Judge was represented by the United States Attorney, as well as counsel for Firestone and McCreary who argued in opposition to the grant of a jury trial.

The patent case finally came on for trial in the district Court on April 15, 1964. Between that date and February 7, 1966, when the present application to disqualify the judge came on for oral argument in this court, the District Court had spent approximately four days per week in hearings; the transcript had grown to over 27,000 pages, including over 1500 exhibits; several key witnesses had died, and it was questionable whether several other witnesses would still be available.

II.

The immediate stimulus for the present move to disqualify Judge Watkins was the Third Circuit's decision in *Rapp* v. *Van Dusen*, 350 F. 2d 806 (3rd Cir. 1964) (en banc), in which a District Judge was required to disqualify himself in accordance with the practice therein adopted for mandamus proceedings and made immediately effective. The court first noted that where the purpose of mandamus is merely to review the correctness of the District Court's decision—rather than a personal challenge on grounds extrinsic to the merits—the District Judge is merely a nominal party with no real interest in the case. In order to "keep him from becoming entangled as an active party to litigation in which his role is judicial and in which he has no personal interest," *id.* at 813, the court announced that henceforth the prevailing party in the District Court would be deemed the respondent in such actions and the Judge would not be required to file an answer or submit a brief in justification of his actions.

Applying this rule in the *Van Dusen* case, the Third

Circuit concluded that the District Judge had exceeded the permissible limits of the newly adopted practice. In an earlier mandamus proceeding in that circuit to review a transfer order under 28 U. S. C. A. § 1404(a), the Judge had designated as his counsel the attorneys for the prevailing party, and had consulted with them in respect to the answer and the brief in the Court of Appeals. "Thus," said the court, "set in motion by our order [to answer the petition for mandamus], there resulted the very involvement which our new procedure is designed to prevent. There is no reason why the beneficial purpose of this procedure should not extend to the present cases." *Id.* at 814. In disqualifying the District Judge, however, the court specifically refrained from interpreting the "of counsel" provision of 28 U. S. C. A. § 455, resting the action instead on its general supervisory power over its District Courts.

We share the Third Circuit's view that it is an undesirable practice to name the District Judge as an active party when mandamus proceedings are employed to test his decision on a motion to transfer or—as in the second mandamus in this case—a demand for jury trial. In order to avoid even the appearance of impropriety in such cases we will henceforth follow the practice outlined in the *Van Dusen* opinion. The District Judge will not be required to file an answer or submit a brief, and his failure to do so will not be deemed an admission of any allegation in the petition. The prevailing party in the District Court will be treated as an intervenor and will not be required to submit a formal motion to intervene.[2]

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2. Accordingly, Rule 31 of the Rules of this court will be amended by numbering the present rule as paragraph "1" and adding a new paragraph "2" as follows:

"2. Where the purpose of the writ is to review a decision of a District Judge, he will not be required to file an answer or submit a brief, and his failure to do so will not be deemed

We think that 28 U. S. C. A. § 455, which bars a judge from participation where he has been "of counsel," is directed primarily at the Judge who was of counsel in a case before his appointment to the bench. We do not think the statute deprives the District Judge of jurisdiction where, rather than acting "as counsel" for one of the parties, the Judge merely reviews and makes suggestions concerning the papers prepared by an attorney for one of the parties, acting on the Judge's behalf. Compare *Roberson* v. *United States,* 249 F. 2d 737 (5th Cir.), *cert. denied,* 356 U. S. 919 (1957); *United States* v. *Vasilick,* 160 F. 2d 631 (3d Cir. 1947). General Tire has disavowed any accusation of personal bias or prejudice in the Judge's conduct of the case, and our revised practice will in the future avoid any appearance of impropriety in similar cases.[3] In the present circumstances we find no impropriety in the Judge's conduct and perceive no justification for disqualifying him under the statute relied on by General Tire.

III.

Since the oral argument McCreary and General Tire have filed certain papers in this court in an effort to amplify the record. They are bottomed upon what purports to be a tape recording of a telephone conversation between a former president of McCreary and one of the lawyers for Firestone. It is suggested that there was falsity in the plaintiffs' representations—in opposition to General's original motion to transfer the case to Ohio—

an admission of any allegation in the petition. Each prevailing party in the District Court will be treated as an intervenor and shall not be required to submit a formal motion to intervene."

3. Where the mandamus petition is based on grounds personal to the Judge and extrinsic to the merits of the case or any of his rulings, the Judge will be well advised to prepare his own answer, or to obtain the assistance of outside counsel.

that McCreary was an independent party prosecuting the case at its own expense. These representations may well have been the determinative factor in the denial of the transfer motion. If they were in fact untrue, it appears that the plaintiffs may have practiced a serious fraud upon the District Court.

However, these papers are not germane to the present petition for mandamus to disqualify the District Judge, and the propriety of the earlier motion to transfer is not now before us. If the tape recording constitutes newly discovered evidence warranting reconsideration of the motion to transfer or any other relief, or the imposition of any sanction, it should first be presented to the District Court, with a motion stating what relief is claimed. After a hearing, the District Court will be in position to determine the authenticity of the tape recording, the truth and materiality of any representations made to the court earlier, and to grant whatever relief may be appropriate.

After the District Court has acted upon an amplified record, this court can entertain any issue appropriately brought up for review. Until then, any application based upon the tape recording or a claim of earlier misrepresentation should be addressed to the District Court.

The petition for writ of mandamus to disqualify the District Judge is denied.

PETITION DENIED.

IN THE UNITED STATES COURT OF APPEALS
For the Fourth Circuit.

THE GENERAL TIRE & RUBBER COMPANY, *Petitioner,* *vs.* THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland, *Respondent.*	No. 10,429.

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF MANDAMUS OR PROHIBITION, OR BOTH

To the Honorable, the Judges of the United States Court of Appeals for the Fourth Circuit:

The answer of R. Dorsey Watkins, United States District Judge for the District of Maryland, to the petition of The General Tire & Rubber Company filed in the above entitled case, respectfully shows:

Respondent admits Petitioner's statement of the alleged Purpose of the Petition; the Statement of the Case; and the Statement of Facts, except as hereinafter modified, explained or simplified.

With respect to the "Statement of Facts", Respondent further shows:

The Transfer Mandamus.

It is Respondent's recollection that when the transfer mandamus petition was filed, Respondent talked with Chief Judge Thomsen, who stated that the United States Attorney customarily formally represented Judges in mandamus cases. Respondent then consulted the then United States Attorney for the District of Maryland (now United States Senator for the State of Maryland) the Honorable Joseph D. Tydings. Mr. Tydings indicated his desire and willingness to cooperate and assist Respondent in the matter. Both he and Respondent, however, recognized the obvious—that an enormous amount of work would be necessary for the United States Attorney to prepare an answer and to appear in court. It was agreed that the logical procedure would be for counsel for plaintiffs, thoroughly familiar with the record, formally to prepare an answer on behalf of Respondent; and that plaintiffs, who had stated an intention to apply for leave to intervene, should, if granted leave, undertake on behalf of their clients the preparation of Memoranda in support of Respondent's decision, which was adverse to defendant, and in that sense in conformity with the position of plaintiffs. The United States Attorney discussed this with Mr. Howard who, with Respondent's approval, undertook the preparation of the answer filed on behalf of Respondent. This answer, which is substantially merely a chronological recitation, with record references, particularly to the actions of Respondent, and which is argumentative only in the sense that it refers to the record reasons for Respondent's decision, was checked and approved as to accuracy by Respondent.

Respondent recalls no authorization to Mr. Howard as to representations on behalf of Respondent except those implicit from Respondent's record position on the transfer motion. Specifically, Respondent denies that Mr. Howard

was ever authorized to state on Respondent's behalf that "We [if 'we' be deemed to include Respondent] don't believe it will ever be necessary to try the Cleveland cases" (Transcript 27,358; Petitioner's Appendix 10). Respondent never expressed any such opinion or belief to any one, and never entertained any such opinion or belief.

Respondent was not consulted about, and made no suggestions of any kind as to, plaintiffs' briefs and/or argument before this Court.

The Jury Trial Mandamus.

When the jury trial mandamus was filed, Respondent conferred with the Honorable Thomas J. Kenney, the new United States Attorney. Mr. Kenney, who was appointed December 6, 1963, knew nothing about the case. Respondent explained to Mr. Kenney how the answer to the transfer mandamus had been handled. It was at first contemplated that a similar procedure would be followed in the jury trial mandamus case, and contact with Mr. Howard was made. Neither Mr. Kenney nor Respondent has any recollection of any "brief prepared by Mr. Howard and the United States Attorney" (Petition, page 3; Respondent's reference to a "brief" (Appendix 11) is in error; no paper of any sort in the nature of a reply by Respondent, prepared by Mr. Howard and/or Mr. Kenney is in Respondent's file; and Mr. Kenney advises Respondent no such paper is in his files).[1] Respondent is positive that

1. Respondent believes that Mr. Howard was in error in referring in his argument in this Court to the "government's brief" (Appendix 10), and Respondent was similarly in error in referring to his approval of that brief (Appendix 11). On further reflection, and based upon his file, Respondent believes that the only Government brief of which he received a copy was a brief filed in the Supreme Court of the United States in opposition to Petitioner's application for a writ of certiorari (No. 878, October Term, 1963). Respondent is confident he was not consulted about said

Respondent's Answer to the jury trial mandamus was entirely his product, having been dictated to the court reporter in Chambers, in the presence of Mr. Howard, Mr. Kenney and Respondent's law clerk. The original of such dictation is in Respondent's files and will be produced if the Court desires. With immaterial editing, entirely Respondent's, it is "Respondent's Answer" as filed.

Petitioner points out (Petition, pages 2-3) that

> ". . . . In this answer Judge Watkins requested the Court of Appeals to 'consider and pass upon the adequacy of the affidavit of personal bias and prejudice' (Appendix 2). This question was held not properly raised by mandamus (331, F. 2d 192, 198, supra). . . ."

Petitioner then propounds the question of whether a judge "who interjects an issue into the mandamus proceeding which is not required by the mandamus petition has been 'of counsel' or is 'so related to or connected with' a party or his attorney as to be disqualified . . ." (Petition, page 4).

The "interjection" charge is twice repeated in Petitioner's argument, page 6.

Respondent points out that the "interjection" of the affidavit of bias or prejudice, in the jury trial mandamus proceeding, was by Petitioner. In its brief (No. 9358) Petitioner said (pages 10-11):

> "General Tire has filed an affidavit of prejudice against the Respondent (Appendix 20-31). The Respondent has refused to disqualify himself *as he should have done* (Appendix 32-36). [Emphasis supplied.] General Tire believes the entire trial will be overhung by the presence of this affidavit on the record and

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brief or aware of its form until it had been filed; and while he agreed with the position taken by the Government, he does not believe that he ever expressed that agreement to Mr. Howard at any time.

further believes that its case should be tried as far as possible by a jury . . ."

Respondent believed that General by this statement, involving a statement as to the alleged merit of the affidavit, and by the use of seventeen pages of the Appendix to reproduce the affidavit and Respondent's Memorandum in respect thereto, was *itself* interjecting this issue into a mandamus case, "which was not required by the mandamus petition." This could scarcely be ignored; but Petitioner did not reply reasserting the correctness of his position; he merely requested this Court to pass upon it. The reasons, perhaps obvious, were stated to counsel for Petitioner on December 16, 1965, as follows:

> "(The Court) The paragraph in question I think is my own, Mr. Merriam. What I was trying to say and what Judge Boreman refused to pass on was that I hoped that this matter could be disposed of in a sense on the merits, so that if we went to trial and had this long trial and then reached a result, that if it were adverse to the defendant, the Fourth Circuit might not (27,361) then say that a jury trial should have been granted or the Court should have disqualified himself. And I was hopeful only of having a decision on the merits. If I was wrong, I wanted to know it then, not for my own benefit or detriment but because, while I did not visualize a trial this length, I knew it was going to be extended litigation, and I had hoped if there were matters then apparent which could ultimately result in the invalidation of the proceedings, that the Appellate Court would consider that and rule on it." (Petition herein, Appendix 12).

This Court declined to pass upon this issue.

When Respondent received and studied the Petition herein, and without having had any communication to or from anyone else. Respondent was impressed by the fact that no formal motion or request had been made to Re-

spondent to disqualify himself. The Petitioner takes the position that calling the court's attention to *Rapp* v. *Van Dusen*, 3 Cir. 1965, 350 F. 2d 806 is all that was necessary or indeed proper to raise the issue of disqualification. On November 18, 1965 Petitioner literally called the Court's attention to the *Van Dusen* case and literally said no more (See Petitioner's Appendix 8). The trial of the case proceeded thereafter. Subsequent to November 18, 1965 the Court was called upon to rule on various pending motions of Petitioner. The Court reviewed the file and found the following:

> On May 6, 1965, Petitioner filed a motion with respect to McCreary in which the Petitioner asked the Court to dismiss the declaratory judgment action of McCreary, to strike the pleadings of McCreary to defendant's counterclaim, at least as far as non-infringement is concerned, to dissolve the injunction against prosecution of McCreary in *General Tire & Rubber Company* v. *McCreary Tire & Rubber Company et al.*, to charge McCreary with the costs, expenses, and attorneys' fees, and to grant such additional relief as the Court might consider appropriate.
>
> The motion was accompanied by a 39-page memorandum and a 10-page appendix. This motion was superseded on October 12, 1965, by a motion to dismiss the declaratory judgment action of McCreary, to dismiss the declaratory judgment action of Firestone or, in the alternative, to dismiss the non-infringement portions of the declaratory judgment actions, to dismiss Petitioner's counterclaim without prejudice pursuant to Rule 41(a)(2), and (c) if the declaratory judgment action is dismissed as to both plaintiffs, to dissolve the injunction concerning prosecution of the Firestone Tire & Rubber Company and Carroll Tire, Inc., in Civil Action No. 36,799, and McCreary Tire & Rubber Company in Civil Action No. 36,806 in the Northern District of Ohio, to charge McCreary Tire & Rubber Company and the Firestone Tire & Rubber

Company with costs and attorneys' fees resulting from their improper declaratory judgment action and conduct, and for such additional relief as the Court might consider proper.

A 22-page memorandum supplementing that of May 6, 1965, accompanied the new motion which was, in turn, supplemented on October 26, 1965, by a statement primarily relating to meetings between Firestone, United States Rubber, and Goodyear in New York on March 16 and 17, 1961, and 21 pages of exhibits with respect thereto.

On November 12, 1965, plaintiffs filed an answer to Petitioner's motion of October 12, 1965, supported by a 10-page memorandum, with a 66-page Appendix A, and on the same day filed a motion to defer the portion of Petitioner's motion relating to charging plaintiffs with costs, expenses, and attorneys' fees until the assessment of costs on the determination of the case.

The Answer was followed on November 15, 1965, by Appendix B, to the effect that Petitioner's conduct barred it from the relief sought and, in any event, required postponement of the consideration of costs until the end of the trial. There were introductory statements of 10 pages. Attachment A purported to show in 68 pages inaccuracies in the answers to plaintiffs' interrogatories, and in four pages inaccuracies in Petitioner's Answers to Requests for Admissions.

Petitioner filed a motion in opposition to plainttiffs' motion to defer assessment of costs, and moved to strike Appendix B, to all of which plaintiffs filed replies. Plaintiffs moved to charge the petitioner with attorney fees, costs, and expenses.

Both when Petitioner's motion of May 6, 1965 and the superseding motion of October 12, 1965 were filed, the Court expressed its intention not to consider the current motion until plaintiffs had had an opportunity to reply. The last paper filed by Petitioner relating to these pending motions was filed on November 22, 1965. The last

papers relating thereto filed by plaintiffs were filed November 29, 1965. The Court carefully considered all the memoranda and most of the exhibits to which reference has just been made and of the cited transcript references.

This had involved a substantial amount of work by Respondent. On December 13, 1965, Respondent stated he was prepared to decide these motions, and did so, substantially adversely to Petitioner. The trial continued through December 13, 14, 15 and 16.

On December 16, 1965 proceedings in this particular case were adjourned until January 10, 1966. On December 16, 1965, the day of adjournment, the Van Dusen case was again called to the Court's attention by Petitioner. The present petition for a writ of mandamus, etc. was filed January 4, 1966 while proceedings in the case were adjourned.

While Petitioner would have preferred the filing of a formal motion for disqualification under 28 U.S.C. 455, since plaintiffs would probably have asked for and been granted an opportunity to brief and argue the motion; Respondent's attention would have been directed thereto; and an opportunity would have been afforded Respondent to file an opinion with respect thereto, Respondent does not urge or desire that the Petition be dismissed on this ground, but only that this Court dispose of the Petition as expeditiously as it can conveniently do so. Had a formal Motion for disqualification been made, Respondent is confident he would have denied it. Presumably Petitioner has stated its case as forcefully as it can in the instant Petition; which, however, is not persuasive to Respondent.

Respondent does not feel it appropriate for him to argue whether or not *Rapp* v. *Van Dusen,* 3 Cir. 1965, 350 F. 2d 806 was correctly decided, and if so, whether it is applicable to the facts in this case. Respondent would merely say,

which he hopes this Court will assume, that he had and has not the slightest idea that his method of procedure in the two prior mandamus proceedings could make Respondent "of counsel" or "so related to or connected with" a party or his attorney as to disqualify Respondent. As to the latter clause, 28 U.S.C. 455 reads: . . . "or is so related to or connected with any party or his attorney as to render it improper, *in his opinion,* for him to sit on the trial . . ." (Emphasis supplied). In Respondent's opinion, it was not and is not improper for him to sit on the trial. If he entertained any doubts with respect thereto, no motion, suggestion or hint would have been or would be necessary to make him withdraw.

Should this court be of the opinion that Respondent is in error, Respondent on receipt of such information will of course promptly comply therewith without the necessity of the issuance of any formal writ.

The foregoing Answer is solely the product of Respondent, but his recollections have been confirmed by discussions had with Senator Tydings and Mr. Kenney with respect to their recollections and files.

Respectfully submitted,

R. Dorsey Watkins,
United States District Judge
District of Maryland, Respondent.

January 21, 1966.

APPENDIX C.

Conflicting Opinions.

HOWARD H. RAPP, Administrator of the Estate of Richard F. Zeller, Deceased, et al., Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN *et al.*, Respondent.

ROBERTA BARRACK, Administratrix, et al., Leah Biernbaum and Dewey Hoffman, Extrs., et al., Doris A. Laister, Extx., et al., Petitioners,

v.

HONORBLE FRANCIS L. VAN DUSEN et al., Respondent.

SIDNEY W. POPKIN et al., Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, United States District Judge for the Eastern District of Pennsylvania, Respondent.

Nos. 14927, 14929 and 14934.

UNITED STATES COURT OF APPEALS

Third Circuit.

Argued Sept. 17, 1964.
Reargued May 26, 1965.
Decided Aug. 10, 1965.

Before BIGGS, *Chief Judge*, and MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges*.

FREEDMAN, *Circuit Judge.*

These three petitions for writs of mandamus or prohibition, or both, were argued together and will be disposed of in one opinion.

On October 4, 1960, an Electra airplane crashed into Boston Harbor a few seconds after takeoff on its scheduled flight to Philadelphia. Numerous suits for the deaths and injuries which resulted were brought in the United States District Courts for the Eastern District of Pennsylvania and the District of Massachusetts. The various defendants in these proceedings were Eastern Airlines, Inc., the owner and operator of the plane, Lockheed Aircraft Corp., the manufacturer of the plane, General Motors Corporation, the maker of its engines, and the United States of America, which had general supervisory authority.[1]

The death and injury of Pennsylvania residents in the Massachusetts plane crash presented the increasingly familiar problem of the applicable rule of damages. Pennsylvania's Wrongful Death and Survival Acts[2] are compensatory, without limitation on the amount of recovery, whereas the Massachusetts Death Act[3] is based on the degree of culpability and fixes recovery at a minimum of $2,000 and a maximum of $20,000.

All of the actions pending in the Eastern District of

1. Fifty-five actions involving 28 plaintiffs were filed in the Eastern District of Pennsylvania; 114 actions were filed in the District of Massachusetts. See *Popkin* v. *Eastern Air Lines, Inc.*, 204 F. Supp. 426, 427, n. 1 (E.D.Pa. 1962).

2. The Pennsylvania Wrongful Death Act is contained in the Act of April 15, 1851, P.L. 669, § 19, Act of April 26, 1855, P.L. 309, as amended, Act of May 13, 1927, P.L. 992 (12 Purdon Pa. St.Ann. §§ 1601-1604).

The Pennsylvania Survival Act is contained in the Fiduciaries Act of April 18, 1949, P. L. 512, §§ 601-605 (20 Purdon Pa.St.Ann. §§ 320.601-320.605).

3. Mass. Ann. Laws, C. 229, § 2 (Supp. 1961).

Pennsylvania were assigned to Judge Francis L. Van Dusen. On motion of the defendants under 28 U.S.C. § 1404(a) Judge Van Dusen ordered the actions transferred to the District of Massachusetts. *Popkin* v. *Eastern Air Lines, Inc.*, 204 F. Supp. 426 E.D. Pa. 1962).

The plaintiffs sought review of the transfer order by petitions in this court for mandamus or prohibition[4] directing Judge Van Dusen to vacate and set aside his order. We ordered the respondent Judge to file separate answers or one consolidated answer to the petitions, and granted leave to the defendants to intervene.[5] An answer was filed by Judge Van Dusen, and after argument we held that the Judge did not have power to transfer the death actions. The basis of the decision was that the plaintiffs were not qualified to sue in Massachusetts as personal representatives at the time the death actions were brought in Pennsylvania. The actions therefore were held not to be such as "might have been brought" (28 U.S.C. § 1404(a)) in Massachusetts and hence did not meet the requirement for transfer there.[6] *Barrack* v. *Van Dusen*, 309 F. 2d 953 (3 Cir. 1963).

The respondents in this court, including Judge Van Dusen, then obtained certiorari (*Van Dusen, United States District Judge, et al.* v. *Barrack, Administratrix, et al.*, 372 U. S. 964, 83 S. Ct. 1088, 10 L. ed. 2d 128 (1963)),

4. In some of the petitions the writ sought is described simply as mandamus, in others as mandamus or prohibition, and in some as mandamus, or prohibtition, or both. We shall refer to mandamus as including prohibition wherever appropriate.

5. The order read, in part:
"It is ORDERED that:
"1. The respondent, the Honorable Francis L. Van Dusen, file answers to the petitions on or before June 28, 1962 ,and if he deems it desirable, file one consolidated answer to all of the petitions. * * *"

6. In the light of this, the court left it open for Judge Van Dusen to reconsider the transfer of the two personal injury suits.

and after argument the Supreme Court reversed the judgment of this court on the ground that the limiting words of § 1404(a) did not apply to incapacity to sue under the law of the State of the transferee forum. It went on to hold that a transfer of the action to Massachusetts would work no change in the applicable substantive law and accordingly the Massachusetts District Court would be required to apply the damage rule which would prevail under Pennsylvania's conflict of laws doctrine.[7] Because this newly announced principle might affect a number of elements relevant to the order of transfer, such as the feasibility of consolidating the Pennsylvania and Massachusetts cases, the need for witnesses on various elements of damage and their convenience, and the appropriateness of the trial of a diversity case in a forum familiar with the applicable state law, the Supreme Court remanded the cause to the District Court so that it might reconsider the motion to transfer. *Van Dusen, United States District Judge et al.* v. *Barrack, Administratrix et al.*, 376 U. S. 612, 84 S. Ct. 805, 11 L. ed. 2d 945 (1964).

On remand to the District Court the plaintiffs moved that Judge Van Dusen disqualify himself under 28 U. S. C. §455[8] from sitting in any further proceedings in the pending ac-

7. Judge Van Dusen had said that he found it unnecessary to decide what was the Pennsylvania rule. *Popkin* v. *Eastern Air Lines, Inc.*, 204 F. Supp. 426, 433 (E. D. Pa. 1962). For a very recent Pennsylvania decision on the conflict of laws problem, see *Griffith* v. *United Air Lines, Inc.*, 416 Pa. 1, 203 A. 2d 796 (1964), reversing the decision of the lower court which is cited at n. 49 in *Van Dusen* v. *Barrack*, 376 U. S. 612, 645, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964).

8. They made no claim of personal bias or prejudice against them and did not invoke the remedy provided by 28 U.S.C. § 144, which provides, in part: "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

tions. Judge Van Dusen denied the motion. Once again plaintiffs seek review by a petition for mandamus or prohibition, or both, in which the Judge is the sole respondent.

[1] The parties have assumed the availability of mandamus for review of Judge Van Dusen's order. Although we held in *Green* v. *Murphy,* 259 F. 2d 591 (3 Cir. 1958), that mandamus will not lie for review of the denial of a claim of personal bias and prejudice made under 28 U. S. C. § 144, we believe that mandamus is the appropriate remedy here. The *Green* case is inapplicable for two reasons. There the interlocutory order was one which later would be reviewable on appeal from the final judgment, whereas, if the present cases are transferred there will be no final judgment in this circuit and any review here must be interlocutory.[9] Secondly, the present case is before us on a claim of disqualification resulting from matters which were brought into existence by order of this court. This we have the duty to correct and we do so in the exercise of our supervisory authority and in aid of our appellate jurisdiction, both well recognized grounds for mandamus.[10]

We turn then to the claims of the petitions. There is no dispute regarding the facts, which Judge Van Dusen with commendable forthrightness spread upon the record after a review of his files. The Judge had designated the attorneys for defendants as his counsel, had consulted with them concerning his answer to the petitions for mandamus

9. See *Paramount Pictures, Inc.* v. *Rodney,* 186 F. 2d 111, 116 (3 Cir. 1951), cert. denied, 340 U. S. 953, 71 S. Ct. 572, 95 L. Ed. 687 (1951); *Pennsylvania Turnpike Commission* v. *Welsh,* 188 F. 2d 447, 449, n. 2 (3 Cir. 1951); In re Josephson, 218 F. 2d 174 (1 Cir. 1954).

10. See *La Buy* v. *Howes Leather Co.,* 352 U. S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957); *United States* v. *United States Dist. Ct. for So. Dist. of N. Y.,* 334 U. S. 258, 68 S. Ct. 1035, 92 L. Ed. 1351 (1947).

and had made suggestions for change in their draft.[11] He later joined as a petitioner in the application to the Supreme Court for certiorari. Petitioners assert that the Judge is disqualified from acting further in these cases because of the "letter" and "spirit" of 28 U. S. C. § 455, which provides: "Any * * * judge of the United States shall disqualify himself in any case in which he * * * has been of counsel * * * or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial * * * or other proceeding therein."

Petitioners make no claim that Judge Van Dusen had any connection with any of the parties to the action. It is asserted, however, that his giving of advice to his own counsel, who also were attorneys for the defendants, and perhaps also his relationship to his counsel while they were attorneys for the defendants, amounted to his being "of counsel", or at least to his having had a relationship to or connection with attorneys for the parties defendant within the meaning of the statute.

On behalf of the respondent it is argued that petitioners may not be heard to complain because it is they who made the Judge the sole respondent and so cast on him the need to answer their petitions, a need which, because of the many cases involved, made it inevitable that he be represented by counsel who were already familiar with the litigation. Similarly, it is said that the petitioners could have avoided making the Judge the respondent in mandamus by

11. Judge Van Dusen expressly disassociated himself from the argument of the intervenors that mandamus should be refused because the petitioners had an adequate remedy by appeal under the Interlocutory Appeals Act, 28 U. S. C. § 1292 (b). See *Barrack* v. *Van Dusen*, 309 F. 2d 953, 956, especially at n. 5 (3 Cir. 1963).

seeking review of the order of transfer under the Interlocutory Appeals Act, 28 U. S. C. § 1292(b).

The conclusion we have reached makes it unnecessary to decide whether Judge Van Dusen's conduct falls within the prohibition of 28 U. S. C. § 455. For in any case, in view of the existing circumstances in this case, which have led us to adopt a new procedure in mandamus, he should not participate in the further course of this litigation. A review of the evolution of mandamus makes it clear that the continuance of the same form of practice in all mandamus cases is undesirable. Cases where the relief sought is directed against the judge individually on grounds extrinsic to the merits of his decision must be distinguished from those in which the relief sought is a determination that the decision was intrinsically erroneous.

Mandamus had its origin in England in the control assumed by the King's judges over the autonomous organs of local government,[12] usually to remedy the loss of some position or office.[13] By the time of Blackstone the writ was in wide use in these areas and in the supervision by the

12. See 10 Holdsworth, A History of English Law (1938), pp. 155, et seq., 243, et seq.; Weintraub, English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus, 6 N. Y. Law Forum 478 (1963).

13. Thus, in Bagg's Case, 11 Co.Rep. 93b, 98a, 77 Eng.Rep. 1271, 1277-78 (1615), Coke said: "* * * [I]t was resolved, that to this Court of King's Bench belongs authority not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due course of law."

The breadth of the jurisdiction thus asserted is shown by Lord Ellesmere's criticism that Coke thereby "hath as much as insinuated that this Court is all-sufficient in itself to manage the State." 77 Eng. Rep. at 1278 n. (B), quoted in Weintraub, cited supra, n. 12, p. 490.

Court of King's Bench over inferior courts,[14] usually in matters more akin to judicial administration than to judicial review.[15] In these circumstances, therefore, no difficulty arose in requiring a judge to make return to the application for the writ.

[2] In the United States the use of mandamus has continually expanded.[16] It was early given a statutory basis by the All Writs Act,[17] which now authorizes the courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Under the statute the "traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior

14. "A *mandamus* * * * lies to compel the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal; to academical degrees; to the use of a meeting-house, etc.: it lies for the production, inspection, or delivery of public books and papers; for the surrender of the *regalia* of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes, which it is impossible to recite minutely. But at present we are more particular to remark, that it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the court of king's bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them: and this, not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice. A *mandamus* may therefore be had to the courts of the city of London, to enter up judgment; to the spiritual courts to grant an administration, to swear a church-warden, and the like." 3 Blackstone's Commentaries, pp. *110-*111.

15. See 2 Spelling, Injunctions and Other Extraordinary Remedies (2d ed. 1901), § 1383.

16. For its use—and the opposition to its use—in the colonial period, see Goodman, Mandamus in the Colonies—The Rise of the Superintending Power of American Courts, 1 Am. J. Legal Hist. 308 (1957); 2 Am. J. Legal Hist. 1 (1958).

17. The provision orginated in the Judiciary Act of 1789, c. 20, §§ 13, 14 (1 Stat. 81), and is now contained in substance in the 1948 revision of the Judicial Code: 28 U. S. C. § 1651.

court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'"[18] It was accordingly said to be limited to cases where no discretion was involved.[19] Its modern use has been extended to include cases of clear abuse of discretion,[20] as well as the "supervisory control of the District Courts by the Courts of Appeals [which] is necessary to proper judicial administration in the federal system."[21] Under this principle it has served increasingly to afford relief from the hardships of the final judgment rule by permitting review of extraordinary interlocutory orders,[22] such as orders of transfer under 28 U. S. C. § 1404(a).[23]

[3-5] Throughout this long development of mandamus no procedural distinction was made between those cases where an attack is made on the merits of a judicial act and those rare instances where the claim is directed against

18. *Roche v. Evaporated Milk Ass'n*, 319 U. S. 21, 26, 63 S. Ct. 938, 941, 87 L. Ed. 1185 (1943). See also *United States Alkali Export Ass'n, Inc.* v. *United States*, 325 U. S. 196, 202, 65 S. Ct. 1120, 89 L. Ed. 1554 (1945).

19. *Life & Fire Insurance Company of New York* v. *Adams*, 9 Pet. (34 U. S.) 571, 9 L. Ed. 233 (1835). See High, Extraordinary Remedies (3d ed. 1896), § 56.

20. See In re Watkins, 271 F. 2d 771, 76 A. L. R. 2d 1113 (5 Cir. 1959); *Hartley Pen Co.* v. *U. S. District Court*, 287 F. 2d 324 (9 Cir. 1961).

21. *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, 259-260, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957).

22. See Note, Appealability in the Federal Courts, 75 Harv. L. Rev. 351, 375-378 (1961); Note, Federal Court Review by Extraordinary Writ: A Clogged Safety Valve in the Final Judgment Rule, 63 Yale L. J. 105 (1953); Note, The Writ of Mandamus: A Possible Answer to the Final Judgment Rule, 50 Col. L. Rev. 1102 (1950).

23. *Swindell-Dressler Corporation* v. *Dumbauld*, 308 F. 2d 267 (3 Cir. 1962); *Barrack* v. *Van Dusen*, 309 F. 2d 953 (3 Cir. 1963); *Van Dusen, U. S. Judge* v. *Barrack*, 376 U. S. 612, 615 n. 3, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964). See also cases collected in 6 Moore, Federal Practice (1953), ¶ 54.10 [4], n. 61.

the judge himself. It was in accordance with this practice[24] that the plaintiffs in their mandamus petitions named Judge Van Dusen as sole respondent, although they sought only judicial review of his order of transfer. We too followed the general practice by affirmatively commanding the respondent Judge to answer the petitions. This practice, however, is undersirable.[25] For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel. This right is impaired when a party is required to meet in his opponent an advocate who has already acted as the judge's counsel in the same litigation.

[6, 7] It follows, therefore, that where the purpose of mandamus is to secure what is in effect an interlocutory review of the intrinsic merits of a judicial act, the procedure should not be the same as that which is appropriate for complaint against a judge's conduct which is extrinsic to the merits of a decision. We shall therefore modify our practice so that in cases such as that which arose here, where mandamus was sought to review an order of transfer, the judge below, although named as a respondent,[26] shall

24. See, e. g., *Swindell-Dressler Corporation* v. *Dumbauld*, 308 F. 2d 267 (3 Cir. 1962).

25. The Supreme Court recognized in Ex parte Fahey, 332 U. S. 258, 260, 67 S. Ct. 1558, 1559 91 L. Ed. 2041 (1947), that mandamus has "the unfortunate consequence of making a judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him."

26. Rule 20 of the proposed Federal Rules of Appellate Procedure would continue to make the judge a respondent in all applications for mandamus or prohibition. It would deem all parties below other than the petitioner to be respondents, and would permit a joint answer by all the respondents. It would require the Court of Appeals to order the judge as well as other respondents

be deemed a nominal party only and the prevailing parties in the challenged decision shall be deemed to be respondents and permitted to answer the petition. It is they who should have the opportunity and the responsibility to vindicate the decision in their favor. The judge, although served with a copy of the petition, shall not be required to file an answer and his failure to controvert any of the allegations of fact in the petition shall not be deemed an admission of their truth. It is appropriate that his original opinion be considered as his answer to the contentions of the petition and if no opinion already appears of record, or if he decides to supplement his opinion, he may file in the mandamus proceeding in this court a memorandum in support and explanation of his challenged action.

This procedure will make it unnecessary for us to issue any preliminary orders to the judge on the filing of a petition for mandamus. It will keep him from becoming entangled as an active party to litigation in which his role is judicial and in which he has no personal interest. It will make it unnecessary for a judge to retain counsel and thus will avoid burdening him with the undesirable alternatives

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to answer the petition within a fixed time, but would authorize the judge, if he does not desire to contest the petition, to so advise the clerk and parties by letter, in which event the petition would not be taken as admitted by the judge's failure to answer. The Advisory Committee's note states that these provisions are based on Supreme Court Rule 31. See 34 F. R. D. 263, 294-295 (1964).

In the First Circuit the practice is to caption the application "In re (or In the Matter of)", followed by the petitioner's name. The judge is designated as a respondent in all mandamus cases, but the successful parties are permitted to intervene and to file an answer instead of the respondent judge. See In re Union Leader Corp., 292 F. 2d 381, 384 (1 Cir. 1961). This practice is not without its problems. See Ibid., at n. 4.

To the effect that the judge should not be named as a respondent, see *Gresham* v. *Superior Court*, 44 Cal App. 2d 664, 112 P. 2d 965, 967 (1941); 6 Moore, Federal Practice (1953), ¶ 54.10 [2], pp. 72-3.

of acting as his own counsel, or seeking outside counsel to serve him with or without charge, or obtaining the services of counsel for the successful parties who continue to serve their clients by acting as his nominal counsel. A judge will thus be guarded from engaging in ex parte discussions with counsel or aligning himself even temporarily with one side in pending litigation.

[8] There will, of course, remain the rare occasion in which the ground for the application is extrinsic to the merits of a decision. Examples of this class of cases are *Davis* v. *Board of School Commissioners of Mobile County, Ala.*, 318 F. 2d 63 (5 Cir. 1963), where a judge was required to rule promptly on a motion for preliminary injunction; and *Hall* v. *West*, 335 F. 2d 481 (5 Cir. 1964), where a recalcitrant judge was ordered to proceed pursuant to the 1954 desegregation order of the Supreme Court. In this class of cases the judge as the respondent may, without being required to do so, file an answer and contest the petition and where appropriate, intervention by interested parties will be allowed.

[9] In view of the extent of relief now afforded by the Interlocutory Appeals Act, 28 U. S. C. § 1292(b), and the principle which ordinarily limits the writ of mandamus to cases where no other remedy is available, petitions for the writ should allege that an unsuccessful request was made for certification under § 1292(b), or why such an application was inappropriate in the circumstances.[27]

[10] In the present case Judge Van Dusen's conduct as a respondent on the review of his transfer order, although occasioned by the order we entered, went beyond our requirement when he employed as his counsel the attorneys for the successful parties below to prepare his answer and

27. See Ex parte Watkins, 260 F. 2d 548 (5 Cir. 1958); Note, Appealability in the Federal Courts, 75 Harv. L. Rev. 351, 382 (1961).

then consulted with them in the absence of their adversaries. Thus, set in motion by our order, there resulted the very involvement which our new procedure is designed to prevent. There is no reason why the beneficial purpose of this procedure should not extend to the present cases.

The dissenting opinions require that we emphasize what is the essence of our decision. We believe it is not necessary to reach the question whether the case falls within § 455, because the district judge's action followed from the order which we expressly directed to him. While we did not require him to obtain any counsel, especially the attorneys for the defendants, nevertheless, this train of events with its undesirable consequences had its origin in our order. To safeguard litigants as well as the trial judge from similar embarrassment we have adopted a procedure for the future. This procedure which will safeguard the administration of justice against even the appearance of loss of impartiality is peculiarly appropriate for application in the present case. These litigants, in whose case the problem arose and the solution was designed, should be included in its benefits. No harm or injustice is visited thereby on any of the parties. No right of the district judge is retrospectively impaired; he has no vested right to sit in this case. This court, which had the power to direct him to answer the original mandamus application, has equal power to neutralize its effect on these litigants when it clouds for them the appearance of the purity of the administration of justice.

[11] We have in no way enlarged the right of review. All that we have done is to decide that wherever the right to mandamus exists—whatever its scope may be and however it may be limited by the Interlocutory Appeals Act—the procedure to be followed should avoid entangling the judge as a party litigant unless the complaint is against

the judge for conduct which is extrinsic to the merits of his decision.

We therefore conclude that Judge Van Dusen should not sit in the further consideration of the motions to transfer or in any subsequent phases of this litigation. We know that Judge Van Dusen will fully effectuate these views without the necessity of our entering any formal order. Petitioners may, however, apply to this court for a formal order directing the issuance of the writ of mandamus if the need therefor should arise.

KALODNER, *Circuit Judge* (concurring).

I am in accord with the holding "that Judge Van Dusen should not sit in the further consideration of the motions to transfer or in any other subsequent phases of this litigation."

I premise my accord on my view that Section 455, 28 U. S. C. A. is a bar to Judge Van Dusen's participation in any further proceedings in the above captioned cases, by reason of its command that a judge "shall disqualify himself in any case in which he * * * has been *of counsel* * * *." (Emphasis supplied.)

The sum of my position is that the involvement of Judge Van Dusen in the 1962 mandamus proceedings was of such significant substance as to bring it within the sweep of an "of counsel" relationship.

On this score, I must immediately declare that the involvement referred to was not per se violative of, or offensive to, the most exacting standard of judicial conduct. He acted in obedience to the express command of this Court in making Answer to the petitions for mandamus or writ of prohibition and it was undeniably his duty in doing so to set his best foot forward in apprising us of the legal premise of his then challenged action in ordering the

transfers of the pending suits to the District of Massachusetts. His *ex parte* counselling with the attorneys he had selected to represent him in the proceedings and in the preparation of the Answers, and his specific "suggested inclusions" in the attorneys' draft of the Answers, were well within the realm of permissible and reasonable action.

It is meet that Judge Van Dusen's role in the preparation of the Answers be considered in the light of his exemplary, conscientious devotion and indefatigable dedication to the performance of his judicial functions, and his admirable passion for perfection.

It cannot be gainsaid, however, that it is the hard fact that Judge Van Dusen in practical effect, albeit not by design, acted as "of counsel" in his earlier detailed participation in the preparation of the Answers in the 1962 mandamus proceedings. That being so, he was required to disqualify himself from participation in subsequent phases of this litigation under the earlier cited mandatory provisions of Section 455.

McLaughlin, *Circuit Judge* (dissenting).

The above opinion of the majority is another ineffectual attempt at smoothing out this contratemps. Despite some textual changes the central situation remains the same. We created it by, as the opinion states, "affirmatively commanding the respondent Judge to answer the petitions." The same opinion now condemns that action of ours as "undesirable". We made the judge a party to the litigation. He was thus forced by this court to see to it that his view as the sitting judge was properly presented to this tribunal. As between the primary litigants he admittedly was and is strictly non-partisan. What he did and all that he did was give us his decisional thinking. We take that, find that he followed our instructions, re-assert his complete impartiality and then oust him from the suits under a prac-

tice which we are restricting to those instances where a judge for one reason or another is allegedly biased.

In this mess of our own making it is shabby treatment to penalize the fine judge concerned for conscientiously obeying our order. No amount of soft language can cover this up or excuse it. It is a little bit late to try to make amends but at the very least we should discharge the rule forthwith without any restrictions whatsoever and leaving the judge completely free to choose his own course.

HASTIE, *Circuit Judge* (dissenting).

As the majority candidly concede, mandamus is being used here to secure interlocutory review of the merits of a decision, as distinguished from the correction of any abuse of authority or other grossly improper conduct by a judge. More specifically, we have been asked to find, and the majority do find, error in the respondent's order denying a request that he disqualify himself from sitting any longer in certain pending litigation.

It is to be emphasized at the outset that the "error" found by this court is no arbitrary or scandalous disregard of any plain duty to withdraw from the case in question. Indeed, no one contends that any such misconduct is involved here. The court does not even decide, as the petitioners have urged it to do, that the respondent has incorrectly interpreted the provision of section 455 of the Judicial Code which requires a judge to disqualify himself in any case "in which he * * * has been of counsel".[1] The

1. Certainly, it would require a dubious and far fetched construction of the phrase "of counsel" to make it cover the situation of a judge who, after being ordered to answer a petition for mandamus, discusses his answer with attorneys who have undertaken to represent him. He is certainly not acting "of counsel" for any other party to the litigation. Apparently, the concept is that in conferring with his lawyers he is "of counsel" for himself, a sort of lawyers' lawyer-client. I would not expect so unlikely an inter-

court decides merely that the respondent erred in not recusing himself because by stepping aside he would have avoided even any possible appearance of partiality which may have been created by his communication with defense counsel while those lawyers were representing him in opposing another petition for mandamus filed against him by the present petitioners in the earlier course of this litigation.

Thus, since the majority do not decide that the respondent's failure to disqualify himself violates any statute or rule of common law, this court must be deciding that the respondent's exercise of discretion, which led him to a considered decision as to the wisdom and desirability of his continuing to hear a law suit, must be overruled in deference to our appellate judgment that it would have been wiser and would have looked better for the respondent to have reached a contrary conclusion.

Even if this were a duly perfected interlocutory appeal, I would consider it unwise and undesirable thus to overrule a district judge's rational exercise of discretion concerning his own continuation in a case. But this is not an interlocutory appeal. It is a petition for mandamus used as a substitute for an appeal. And, until this case, I had heretofore thought it clear that mandamus could not thus be substituted for an appeal.

Properly used, mandamus against a judge is essentially different from appeal from his decision. The differences are both formal and functional. In form mandamus is a distinct ancillary proceeding against the judge himself. Its essential role is to correct improper conduct and failure to

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pretation of section 455 even to occur to a judge seeking conscientiously to be guided by that section. And certainly the failure of a judge to reason so oddly is no proper occasion for coercing him by an extraordinary writ designed to redress narrowly limited categories of exceptional wrongs and plainly improper conduct.

be guided by limitations on judicial power. Occasional uses of mandamus against a judge which do not respect these limited functions of the writ are, in my view, misuses of the writ. They are anomalous and do not justify new anomalies. The Supreme Court has recently reminded us, not for the first time, that "[e]xtraordinary writs are 'reserved for really extraordinary causes,' Ex parte Fahey, 332 U. S. 258, 260 [67 S. Ct. 1558, 91 L. Ed. 2041] (1947), and then only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 [63 S. Ct. 938, 87 L. Ed. 1185] (1943)." *Platt* v. *Minnesota Mining & Mfg. Co.*, 1964, 376 U. S. 240, 245, 84 S. Ct. 769, 772, 11 L. Ed. 2d 674.

My confidence that this is no proper case for mandamus is increased by the fact that the majority opinion recognizes that such a proceeding as this is "in effect an interlocutory review of the intrinsic merits of a judicial act", though called "mandamus". The new procedure proposed for cases of this sort, with the trial judge treated as merely a "'nominal" party and the original litigants contesting the merits of a disputed decision in a reviewing court, is itself a mechanics of appellate review as contrasted with the characteristic mode of mandamus. Moreover, it is proposed that a proceeding like this shall serve only as a judicially devised expedient of last resort for parties who have tried unsuccessfully to obtain appellate review under the procedure provided by Congress in the Interlocutory Appeals Act, 28 U. S. C. § 1292(b), to define and limit our power to grant interlocutory appeals. In these circumstances, I fear we shall be more vulnerable to the charge of refusing to respect the statutory limits of our own power to review than the present respondent is to any charge of exceeding his authority by continuing to preside over this case below.

I would dismiss the present petition and permit the principal litigation, already inordinately delayed by years of preliminary disputation over where it shall be tried and by whom, to proceed, hopefully, at an accelerated pace. I interpose no objection to the revised procedure for cases of this kind as announced in the opinion of the court, because that procedure seems unobjectionable for appellate practice and in my view such cases as this present unwarranted appeals rather than true original actions of mandamus.

I am authorized to state that JUDGE STALEY joins in this dissent.

* * * * *

TEXACO, INC., a Delaware Corporation, Petitioner,

v.

HONORABLE STEPHEN S. CHANDLER, Chief Judge of the United States District Court for the Western District of Oklahoma, Respondent.

No. 8216.

UNITED STATES COURT OF APPEALS.

Tenth Circuit.

Dec. 27, 1965.

Before PICKETT, LEWIS, BREITENSTEIN, HILL and SETH, *Circuit Judges.*

PER CURIAM.

In this mandamus action Texaco Inc. prays for an order directing Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, to proceed no further in *Hirschfield, et al.* v. *Texaco, Inc.*, Civil action No. 64-259, pending in the aforesaid court.

It is alleged that on June 6, 1964, the plaintiffs, Norman

Hirschfield, Edward C. Joullian III, and Edward C. Joullian brought the aforesaid action in the United States District Court for the Western District of Oklahoma in which a judgment in the sum of $25,000,000 was sought against the defendant Texaco, Inc. for services rendered; that at the time the action was filed there was pending in the same court an action wherein W. H. Pat O'Bryan sought to recover damages in the sum of $10,000,000 alleged to have been caused by the misconduct of Judge Chandler before a federal grand jury which returned an indictment charging O'Bryan with a felony,[1] that in the damage action alleging Judge Chandler to be guilty of malicious prosecution, libel and slander, he was represented by five attorneys headed by John M. Cantrell, an Oklahoma attorney; that Mr. Cantrell was one of the attorneys representing the plaintiffs in the aforesaid Texaco suit; and that Mr. Cantrell continued to represent Judge Chandler in the O'Bryan case until after perfection of an appeal. Judge Chandler moved to dismiss this petition for a writ of mandamus, and later filed what was designated a "Waiver of Oral Argument and Rejoinder." These documents discuss the proceedings in the Texaco case at length, and we treat them as a response.

[1-3] After the Texaco case was at issue, there were numerous and lengthy hearings on the question of disqualification, and other matters, relating to the case. Judge Chandler repeatedly stated that he did not intend to try the case, but refused to disqualify himself and assign it to another judge. 28 U. S. C. § 455 provides:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substan-

1. The O'Bryan action was brought in an Oklahoma State Court. After removal to the United States District Court for the Western District of Oklahoma, it was dismissed on the ground that Judge Chandler was immune from civil liability for the alleged acts of misconduct. The dismissal was affirmed by this court. *W. H. Pat O'Bryan* v. *Chandler*, 10 Cir., 352 F. 2d 987.

> tial interest, has been counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

In *Rapp* v. *Van Dusen*, 3 Cir., 350 F. 2d 806, it was held that this statute disqualified a United States District Judge from proceeding in a civil case pending before him where attorneys for one of the parties had represented the judge in a mandamus action brought to compel the judge to transfer a case under 28 U. S. C. § 1404(a). The judge in the mandamus action had no personal interest and was only a nominal party. In that case, at p. 812, the court said:

> "For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel. This right is impaired when a party is required to meet in his opponent an advocate who has already acted as the judge's counsel in the same litigation."

In the case at bar, Mr. Cantrell was representing Judge Chandler as a defendant in an action wherein the plaintiff sought a $10,000,000 judgment against the Judge as an individual. Confining our decision to the particular facts of this case, we hold that Judge Chandler's connection with one of the attorneys for the plaintiffs in the Texaco case was sufficient to constitute a connection with a "party or his attorney" within the meaning of Section 455.

[4] The jurisdiction of this court to take action to guarantee a fair and impartial trial is no longer open to question. Upon an adequate showing, this court has held that it has the "power and inescapable duty", whether under the all-writs statute, 28 U. S. C. § 1651, or under its

inherent powers of appellate jurisdiction, "to effectuate what seems to us to be the manifest ends of justice." *United States* v. *Ritter*, 10 Cir., 273 F. 2d 30, 32, cert. denied 362 U. S. 950, 80 S. Ct. 863, 4 L. Ed. 2d 869; *Occidental Petroleum Corp.* v. *Chandler*, 10 Cir., 303 F. 2d 55, cert. denied 372 U. S. 915, 83 S. Ct. 718, 9 L. Ed. 2d 722, Reh. denied 373 U. S. 906, 83 S. Ct. 1288, 10 L. Ed. 2d 201.

It is Therefore Ordered that the Honorable Stephen S. Chandler, Respondent herein, shall proceed no further in the case of *Hirschfield, et al.* v. *Texaco Inc.*, numbered 64-259 on the Civil Docket of the United States District Court for the Western District of Oklahoma, and that all further proceedings in that case be heard and determined by a judge of the United States Court of Appeals for the Tenth Circuit.

The Clerk of this Court is hereby directed to transmit forthwith a copy of this order to the Clerk of the United States District Court for the Western District of Oklahoma for filing in the aforesaid case, Civil No. 64-259.

APPENDIX D.

Transcript of Telephone Conversation of May 9, 1961, Between Harold J. Birch and Harry C. McCreary, Sr.

On Thursday, the 14th day of April, 1966, at approximately 12:10 p.m., Mr. Walter J. Blenko, Jr. appeared at the offices of Morse, Gantverg, Hodge & Smith, 419 The Bigelow, Pittsburgh, Pennsylvania, accompanied by Mr. Jerome Lombardi who was carrying a brown paper envelope sealed, and with the name of Mr. Harry C. McCreary over the seals. This envelope was handed to me by Mr. Lombardi. The envelope was headed "McCreary Tire & Rubber Co., Precision-Built Tires Since 1915, Indiana, Pennsylvania 15701." The envelope was marked "Diplomat Clasp No. 97J, Substance 32, Jute Finish, 10 x 13." Mr. McCreary's name appeared on three places over the seals in handwriting. I was then requested to open the seal of the envelope, which I did.

Inside the envelope was contained a smaller white envelope headed "McCreary Tires, Built for Longer Service, Precision Built Tires Since 1915, McCreary Tire & Rubber, Co., Indiana, Pa."

Then in typing on the white envelope appeared: "Conversation between Harry C. McCreary, Pres. McCreary Tire & Rubber Co., and Harold J. Birch, Attorney for Firestone and McCreary in our proceedings against the General Tire & Rubber Company, through the Federal Court in Baltimore, held 2:15 the afternoon of Tuesday, May 9, 1961."

The white envelope was unsealed and contained a Dictaphone Time-Master indicator with an ink indication on the number 60, and a paper clip and several red marks.

Also contained in the larger outside envelope was a box headed "24 Dictascribe Indicator Pads by Dictaphone Corporation Reg U S Pat Off for the Dictaphone Time-Master Dictating Machine." The name Joan Welsh and the letter "3" also appeared in pencil writing.

Contained in the box was a Dictaphone Time-Master red-colored belt with three tracks, approximately three-quarters of the belt being used.

I was then requested to put the red colored belt onto a Dictaphone Time-Master machine, which was provided by Mr. Lombardi, which I did.

The following is a transcript of the material on the Time-Master belt:

* * * * *

Voice No. 1: Hello, hello.

Voice No. 2: Hello, hello, sir.

Voice No. 1: Hello.

Voice No. 2: Can you hear me?

Voice No. 1: Yes.

Voice No. 2: Just a moment for Mr. Birch in Washington.

Voice No. 1: Right.

Voice No. 3: Hello.

Voice No. 1: Hello.

Voice No. 3: Hal Birch, Mr. McCreary.

Voice No. 1: Yes.

Voice No. 3: How are you up in Indiana?

Voice No. 1: First class.

Voice No. 3: Why, we've been going around and around and around with General, as you know, and we've got a little bit of a problem. There is a bit of a schism in their approach to McCreary as against Firestone, and we think they're probably trying to line up to say in the long run

that McCreary can be transferred out because they are just Firestone's little patsy, and Firestone is paying the whole bill.

Now, here is what we'd like to do, if it's all right with you, with full recognition that the agreement that was made between you and Stanley Clark is not going to, in the long run, change one tiny little bit. I don't want to put anything in the mail, and I don't want to talk about it too much, for obvious reasons.

Voice No. 1: Right.

Voice: No. 3: What we would like to do is this: The relative production as between you and Firestone is about 99 to 1.

Voice No. 1: That sounds about right.

Voice No. 3: In other words, you are 1 per cent of their total business, tire business.

Voice No. 1: Right.

Voice No. 3: So what we would like to do would be to formally bill you folks for 1 per cent of the cost of this litigation, which this last month would add up to the tremendous figure of $34.86.

Voice No. 1: I believe we could stand that.

Voice No. 3: If you could stand that—

Voice No. 1: I think s—

Voice No. 3: Well, that's about what it'll be monthly, and then if you could send us that amount of money just as if we were—

Voice No. 1: Right.

Voice No. 3: —Firestone didn't even exist.

Voice No. 1: Right.

Voice No. 3: Bearing in mind that—

Voice No. 1: Right.

Voice No. 3: —after this is all over with, why, everything will come out in the wash.

Voice No. 1: That's right.

Voice No. 3: Okay?

Voice No. 1: That's perfectly all right.

Voice No. 3: All right. Well, we didn't think you would have any serious—

Voice No. 1: Not at all, and I certainly don't want them to be able to split this thing apart.

Voice No. 3: Well, that is right, because what they have now done, I don't know whether Ed has talked to you about this recently, but what they have now done is move in Ohio to enjoin Firestone from proceeding in the Maryland lawsuit. Well, of course, we have already moved in Maryland to enjoin them from proceeding against Firestone in any other court.

Voice No. 1: Uh hum.

Voice No. 3: So this is—ah—in two courts now, and real interesting, but they did not move to enjoin McCreary.

Voice No. 1: Uh huh.

Voice No. 3: See?

Voice No. 1: Uh huh.

Voice No. 3: So we don't want to leave any stone unturned in case they should file an interrogatory and ask McCreary if they are paying their toll in this lawsuit.

Voice No. 1: I certainly—

Voice No. 3: Whatsoever.

Voice No. 1: I certainly want to be able to prove it.

Voice No. 3: Right. So what we want to do is to send you—and we'll send you a bill for both March and April.

Voive No. 1: Fair enough.

Voice No. 3: The March bill will be even smaller than the $34.00.

Voice No. 1: Well, that's quite all right.

Voice No. 3: (Laughter) Okay.

Voice No. 1: That's okay.

Voice No. 3: All right, Mr. McCreary. We're just starting in on your other job. We've gotten a new man here with us who has taken a big load off of me, which makes it possible—I guess you got our announcement—

Voice No. 1: Uh—

Voice No. 3: —didn't you, about George Simmons joining our law firm?

Voice No. 1: Oh, yes, yes. Yes.

Voice No. 3: Well, George is an old buddy of mine from Hercules Powder Company and been in this business for thirteen or fourteen years, and he wanted to get out of private practice and into—or into private practice and out of corporate practice.

Voice No. 1: Right.

Voice No. 3: So he was just made to order. He's got a good background and he's an excellent chemist, and a fine fellow. We're very, very fortunate to have him. It just makes it a little bit more easy for me to do some of the things I want to do.

Voice No. 1: Good.

Voice No. 3: (Laughter) Okay.

Voice No. 1: Well, I'm not too concerned about that other thing because I think maybe I'm barking up a gum stump anyway.

Voice No. 3: Well, it isn't—no use stopping barking until you are sure nothing is going to fall out of that gum tree.

Voice No. 1: Well, that's true.

Voice No. 3: And we'll find out for you real inexpensively.

Voice No. 1: Okay, and on that bill now be sure and mark the envelope to my attention.

Voice No. 3: All right.

Voice No. 1: So that it comes right straight to me.

Voice No. 3: Fine, we'll do that.

Voice No. 1: Righto.

Voice No. 3: Okay, Mr. McCreary.

Voice No. 1: Good luck to you.

Voice No. 3: Right, nice talking to you.

Voice No. 1: All right.

The preceding was a transcription of a correspondence between Harold Birch, Attorney for Firestone, and McCreary, in our proceedings against the General Tire & Rubber Company through the Federal Court in Baltimore. The conversation was held about 2:15 the afternoon of Tuesday, May 9th.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF ALLEGHENY. } ss.

I hereby certify that the above and foregoing is a true and correct transcript of the events occurring on Thursday, April 14th, 1966, and a true and correct transcript of the Dictaphone Time-Master Belt referred to therein and made by me on said date.

SIDNEY GANTVERG,
Court-Reporter.

APPENDIX E.

Portions of Oral Argument Made Before District Court on Transfer Motion Heard July 6, 1961.

Remarks of Edward S. Irons, Attorney for Firestone and McCreary.

IN THE UNITED STATES DISTRICT COURT,
For the District of Maryland.

The Firestone Tire & Rubber Co. and McCreary Tire & Rubber Company, *vs.* General Tire & Rubber Company	No. 12932 Civil.

Baltimore, Maryland

July 6, 1961.

The above-entitled case came on for hearing on Motion of Plaintiff, Firestone Tire & Rubber Co., to enjoin defendant from proceeding in an action subsequently filed; Motion of Plaintiffs to enjoin defendant from proceeding in action subsequently filed; Motion of Defendant to dismiss or in the alternative to transfer action to the U. S. District Court for Northern District of Ohio, Eastern Division, before His Honor, R. Dorsey Watkins, at 12:00 noon.

Appearances.

For the Plaintiffs:

Benjamin C. Howard
Stanley M. Clark
William Wade Beckett
Edward S. Irons
Harold J. Birch

For the Defendant:

Edward B. Beale
Clyde V. Erwin, Jr.
Richard F. Cleveland

This brings us up to McCreary, which I think is, perhaps, a good place for me to conclude my argument.

Mr. McCreary is one of what is almost a rarity in this country today, he is one of the tire manufacturers, of whom there aren't more than a dozen or so, that are still independent. He operates a tire producing facility which produces less than one per cent of the passenger car tires in this country, in Indiana and Pennsylvania.

The Court: What brand or trade—

Mr. Irons: McCreary, your Honor.

A large part of this production is truck tires, but he also makes passenger tires.

He, like all the others of the rubber producers in this country, was not only offered a license, but threatened with litigation by these patentees. He comes here jointly as plaintiff with Firestone, but other than that, independent, he pays my bills as I send them to him, he can terminate this action, he can accept a judgment against him or he can take such other action as he wants to, he is subject to no mandate or direction from Firestone.

He is here because he can't, in good conscience and good

business judgment, continue his business with this cloud over him.

As to McCreary, it is, in my mind, wholly obvious that these defendants have no case for transfer. The home forum argument doesn't apply. McCreary is infringing here as well as any place else, there is no, as Mr. Beale, I think, recognized, basic distinction between his activities in Ohio, commercially, and his activity in Maryland.

Mr. McCreary tells me he can come to Ohio, or—I am sorry—come to Baltimore equally, if not more conveniently, than he can come to Ohio, he has selected this forum, and what I said in my brief which might have led your Honor to the erroneous conclusion I was arguing about power, was, in essence, this. Until these defendants make out a case for transfer which is good against McCreary, perhaps transferral is precluded because I don't believe the severance can be forced, this was the pitch of my argument as to power.

McCreary's witnesses, as far as the vital issues in this case, like Firestone's, are in Washington. He can, perhaps, derive some benefit from his association with Firestone, but he comes here independently, and not as Firestone's agent or cat's paw, and I think that should be clearly understood.

* * * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 393

THE GENERAL TIRE & RUBBER COMPANY,
Petitioner,

v.

THE HONORABLE R. DORSEY WATKINS,
UNITED STATES DISTRICT JUDGE FOR THE
DISTRICT OF MARYLAND,
Respondent,

AND

THE FIRESTONE TIRE & RUBBER COMPANY,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE INTERVENOR IN OPPOSITION

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AND

THE FIRESTONE TIRE & RUBBER COMPANY,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE INTERVENOR IN OPPOSITION

The Firestone Tire & Rubber Company, named as an intervenor in the mandamus proceeding instituted by petitioner in the United States Court of Appeals for the Fourth Circuit, files this brief in opposition to the petition for writ of certiorari. The intervenor believes it essential that the nature of this mandamus proceeding first be restated and that the questions properly at issue then be formulated in

light of that restatement. Once that is done, the ruling below emerges not only as an eminently correct decision but as one presenting no basis for review by this Court.

RESTATEMENT OF THE CASE

This is the third mandamus proceeding instituted by the petitioner, a patent owner, against District Judge Watkins since he began presiding over the intervenor's declaratory judgment action against the petitioner. That action, filed more than five years ago, challenges the validity of the petitioner's patent issued in 1960, relating to pneumatic tires and tread stock, and pertains to certain other related issues. Actual trial of the declaratory judgment action began before Judge Watkins on April 15, 1964, and is now "hopefully" nearing completion. More than two years and five months (less summer recesses) of trial have now elapsed, resulting in a transcript of nearly 36,000 pages (in addition to thousands of pages of exhibits). And as the Court of Appeals noted (Pet. App. p. 7a), "several key witnesses . . . [have] died, and it . . . [is] questionable whether several other witnesses would still be available."

The present mandamus proceeding is frankly designed (see Pet. p. 11) to disqualify Judge Watkins from further participation in this still-pending trial. That effort, as the Court of Appeals noted (Pet. App. p. 9a), involves no accusation of personal bias or prejudice in the Judge's conduct of the case. The claimed disqualification stems, rather, from certain steps taken by Judge Watkins in response to two mandamus actions filed against him in the Fourth Circuit by the petitioner.

1. The First Mandamus Proceeding

Petitioner's initial motion to transfer was filed on April 13, argued on July 6 and denied July 24, 1961. On September 6, 1963, shortly prior to the time for commencement

of the declaratory judgment trial, petitioner again moved to transfer the action to a federal court in Ohio with the hope of consolidation with a similar case involving the same patent. Judge Watkins denied the motion. Petitioner's true purpose was stated by its counsel as follows:

> ". . . (Mr. Merriam) . . . I want to agree with Mr. Irons on one thing . . . And that is, he said that we have consistently sought to have this case in one way or another consolidated with the Cleveland case and tried there, and I agree with him. I don't think I have hidden anything about it. I have tried in every way that I thought of and maybe some way that nobody else has thought of before to do it. At any rate, . . . I have tried" (Tr. 25,806-7).

The petitioner sought review of that denial by filing a mandamus petition in the Fourth Circuit.

As the nominal respondent in that mandamus action, Judge Watkins followed a custom of long standing and consulted with the then United States Attorney (now Senator Tydings) concerning representation of the Judge before the Fourth Circuit. Because of the complexity of the case and the great amount of time needed to familiarize the United States Attorney with the matter, it was agreed that it would be more logical to have an attorney already familiar with the record represent the Judge. Mr. Benjamin C. Howard, one of the counsel for the intervenor herein (Firestone Tire & Rubber Co.), was accordingly appointed. Mr. Howard then prepared a chronological recitation, with record references, of the reasons for the Judge's decision with reference to the transfer motion. This recitation, checked for accuracy and approved by the Judge, was filed in the Fourth Circuit as the Judge's answer. Mr. Howard later argued orally before the Fourth Circuit on the Judge's behalf, making plain that he was "appearing only for Judge Watkins" and was "authorized"

to state "a certain opinion for Judge Watkins" (See Pet. p. 7; Pet. App. pp. 12a-13a).

The Fourth Circuit, after consideration of the briefs and arguments, affirmed Judge Watkins' action respecting the transfer and dismissed the mandamus petition. *General Tire & Rubber Co. v. Watkins*, 326 F. 2d 926 (C.A. 4). This Court denied certiorari. 377 U.S. 909.

2. The Second Mandamus Proceeding

In January of 1964, prior to the commencement of trial, the petitioner filed in the District Court a belated demand for a jury trial pursuant to Rules 38(a) and 39(b) of the Federal Rules of Civil Procedure. Judge Watkins denied the request. Thereafter petitioner filed a second mandamus petition in the Fourth Circuit, seeking review of the jury trial denial. This time the Judge was represented primarily by the present United States Attorney Thomas J. Kenney. The answer to this mandamus was entirely the product of the Judge, having been dictated to the Court Reporter in chambers in the presence of Mr. Howard, Mr. Kenney and the Judge's Law Clerk. Neither Mr. Howard nor Mr. Kenney, other than signing the answer with the Judge, took any further part in the proceedings on behalf of the Judge and no argument on behalf of the Judge was presented in the Court of Appeals (See Pet. App. pp. 13a-14a). Mr. Howard was also named as counsel to the Judge.

The Fourth Circuit denied the mandamus petition and affirmed the refusal to grant a jury trial. *General Tire & Rubber Co. v. Watkins*, 331 F. 2d 192 (C.A. 4). Certiorari was denied by this Court. 377 U.S. 952.

3. The Affidavit of Personal Bias or Prejudice

On November 20, 1963, while the first mandamus petition was *sub judice*, petitioner had filed an affidavit of personal

bias or prejudice in support of a demand for Judge Watkins' disqualification under 28 U.S.C. §144. Included among the charges in the affidavit was an assertion that the Judge had acted as an "advocate" for Firestone Tire & Rubber Co. It is significant that no complaint was made when the affidavit of personal bias or prejudice was filed with respect to Mr. Howard's participation in the filing of the answer or his argument in the Court of Appeals, which had taken place prior to the filing of the affidavit and was, of course, well known by the petitioner.

Judge Watkins declined to disqualify himself in light of this affidavit. The Fourth Circuit, in dismissing the second mandamus petition, declined an "invitation" to pass upon the sufficiency of the affidavit of prejudice, stating that the Judge's refusal to disqualify himself "is not now appealable as a final order." 331 F. 2d at 198. There the matter now rests, the affidavit of personal bias or prejudice forming no part of the present mandamus proceeding.

4. The Third Mandamus Proceeding

On two occasions during the course of the trial in the District Court, while discussing various other matters, the petitioner called Judge Watkins' attention to the recent ruling of the Third Circuit in *Rapp v. Van Dusen*, 350 F. 2d 806. Petitioner takes the position that merely calling attention to that decision was sufficient to obtain a ruling as to the Judge's qualification to sit in the light of 28 U.S.C. §455 (See Pet. p. 8). No formal motion for disqualification was ever filed, and the intervenor herein was never given any opportunity to brief or argue the matter in the District Court (See Pet. App. p. 18a).

Judge Watkins, in the absence of a formal motion, made no ruling on the effort to disqualify him under 28 U.S.C. §455.

Without further ado, petitioner filed the instant mandamus action in the Fourth Circuit on January 4, 1966, seeking an order disqualifying Judge Watkins under 28 U.S.C. §455 solely on the basis of his actions several years before in connection with the first two mandamus proceedings. This time Judge Watkins filed his own answer to the petition (Pet. App. pp. 11a-19a), and was not otherwise represented before the Fourth Circuit. In this answer Judge Watkins stated that he "would have preferred the filing of a formal motion . . . since plaintiffs [Intervenor Firestone] would probably have asked for and been granted an opportunity to brief and argue the motion; respondent's attention would have been directed thereto; and an opportunity would have been afforded respondent to file an opinion with respect thereto,". Judge Watkins further stated that "Had a formal motion for disqualification been made, respondent is confident he would have denied it. Presumably petitioner has stated its case as forcefully as it can in the instant petition; which, however, is not persuasive to respondent" (Pet. App. 18a).

In denying this third mandamus petition, the Fourth Circuit said:

> "We find no impropriety in the Judge's conduct and perceive no justification for disqualifying him under the statute relied on by General Tire" (Pet. App. 9a).

The Fourth Circuit also made the following determinations:

(1) In agreement with certain of the Third Circuit's views in *Rapp v. Van Dusen*, 350 F. 2d 806, the Fourth Circuit found "that it is an undesirable practice to name the District Judge as an active party where mandamus proceedings are employed to test his decision on a motion to transfer or — as in the second mandamus in this case — a

demand for jury trial." The court, in order "to avoid even the appearance of impropriety in such cases", accordingly amended its own Rule 31 to provide that henceforth a District Judge will not be required in such situations to file an answer or submit a brief and that his failure to do so will not be deemed an admission of any allegation in the mandamus petition. The new rule further provides that the prevailing party in the District Court will be automatically treated as an intervenor in the Fourth Circuit mandamus proceedings (Pet. App. p. 8a).

(2) The Fourth Circuit further ruled that 28 U.S.C. §455, which bars a judge from participation in a case where he has been "of counsel," is directed primarily at the Judge who was of counsel in a matter prior to his appointment to the bench. The statute, said the court, is not concerned with the Judge who "merely reviews and makes suggestions concerning the papers prepared by an attorney for one of the parties, acting on the Judge's behalf" (Pet. App. p. 9a). Hence, concluded the court, "we find no impropriety in the Judge's conduct and perceive no justification for disqualifying him under the statute relied on by General Tire" (Pet. App. p. 9a).

Judge Watkins was not represented by counsel in the Fourth Circuit Court of Appeals and has not appeared befort this Court or filed any pleadings responsive to the petition filed herein.

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether the Fourth Circuit, having amended its procedural rules of court so that henceforth District Judges "will not be required to file an answer or submit a brief" in mandamus actions designed to review their judicial actions, abused its discretion in not applying its rule retroactively so as to disqualify a District Judge where (a) the

District Judge committed no impropriety in responding to prior mandamus petitions, (b) disqualification at this point would disrupt and prejudice a long and complex trial now under way and greatly advanced, (c) disqualification is sought solely as a reward or incentive for the party initiating the proceeding in which the new rule is announced, and (d) no injury to that party has been or can be shown.

2. Whether a District Judge, named as a respondent in mandamus proceedings testing his judicial actions, was compelled to disqualify himself under 28 U.S.C. §455, as having been "of counsel", or "so related to or connected with any party or his attorney as to render it improper" to sit, where he followed the then established practice of (a) appointing as his attorney in the mandamus actions counsel for the prevailing party in the District Court, and (b) reviewing and making suggestions concerning the papers prepared by that attorney.

THE WRIT SHOULD BE DENIED

The decision below, viewed in light of its factual content and the issues involved, presents no special or important reason for granting the writ of certiorari. There is no conflict with any other decision of any other court. And there is no question of wide public interest presented.

This mandamus proceeding is brought admittedly "to disqualify Judge Watkins" and is in effect but another of a long chapter of efforts in which the petitioner has engaged since April of 1961 to avoid a trial and adjudication in this complicated patent suit before District Judge Watkins and is an effort to re-open the matter of transfer to Cleveland and possible consolidation, which has been repeatedly and finally adjudicated.

1. The promulgation and application of the new rule announced in this case concern matters peculiarly within the competence and discretion of the Fourth Circuit.

The Fourth Circuit's amendment of its own procedural rules regarding a District Judge's participation in mandamus proceedings presents no basis for invoking this Court's review powers. Nor is there any reason for this Court to second-guess that court's determination that the circumstances of this case do not warrant the disqualification of Judge Watkins.

The Rule amendment promulgated below, petitioner concedes (Pet. p. 10), is an appropriate response to a problem which has long plagued District Judges named as respondents in mandamus proceedings designed to review their judicial acts. Apart from the serious question as to the availability of mandamus to secure such review, see *La Buy v. Howes Leather Co.*, 352 U.S. 249, such a procedure has long been recognized as having "the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him." *Ex parte Fahey*, 332 U.S. 258, 260; *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384-385.

To eliminate that "unfortunate consequence" in mandamus actions originating in this tribunal, this Court in revising its Rules in 1954 adopted Rule 31(3). In language similar to that adopted here by the Fourth Circuit, Rule 31(3) of this Court's Rules provides that the respondent judge need not contest or respond to a mandamus petition and that all other parties are deemed to be respondents in this Court. Thus was eliminated the *ex parte* nature of mandamus proceedings in this Court, making

them adversary in nature and directed against the real parties in interest. See Wiener, The Supreme Court's New Rules, 68 Harv. L. Rev. 20, 70-72 (1954).[1]

The identical rule has been proposed for adoption as part of the Uniform Rules of Federal Appellate Procedure. See 34 F.R.D. 263, 294-295.[2] When if those Rules become effective the amendment promulgated here by the Fourth Circuit will in effect be reflective of the uniform judicial response to the procedural problem posed by naming District Judges as respondents in mandamus petitions. In these circumstances no further action in this Court is warranted at this time.

Nor is there any need for this Court to determine if the prophylactic rule announced by the Fourth Circuit should be applied retroactively so as to disqualify Judge Watkins from further participation in this case. The employment by a District Judge of counsel to defend himself in a mandamus action, while said to be an "unfortunate consequence

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[1] As Professor Moore has stated: "In the bulk of cases the lower court has no more interest in upholding the questioned order than it has in upholding one of its appealable orders; the interest is professional, not legal. In these cases the judge is really a 'formal' party. The litigant in whose favor the order runs is the real party in interest; and quite generally desires and is permitted to intervene in the appellate court in support of the questioned order. Appellate practice should recognize these facts of life." 6 Moore's Federal Practice ¶54.10[2], pp. 72-73 (2d ed. 1965).

[2] Rule 20(b), as proposed in the 1964 Preliminary Draft by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, provides with respect to mandamus petitions:

> "All parties below other than the petitioner shall also be deemed respondents for all purposes. Respondents may answer jointly. If the judge or judges named respondents do not desire to contest the petition, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted."

See also *Rapp v. Van Dusen*, 350 F. 2d 806, 812-813, fn. 26 (C.A. 3).

of making the judge a litigant," *Ex parte Fahey, supra,* has never been deemed *per se* to be improper or to be a basis for disqualification. Time and again mandamus cases have reached this Court wherein judges have been represented here and in Courts of Appeals by counsel for the prevailing parties in the district courts. Not once has this Court indicated that there was any impropriety in such representation, however "unfortunate" it might be. See, e.g., *Ex parte Peru,* 318 U.S. 578; *Roche v. Evaporated Milk Association,* 319 U.S. 21; *United States v. United States District Court,* 334 U.S. 258; *Norwood v. Kirkpatrick,* 349 U.S. 29; *Platt v. Minnesota Mining Co.,* 376 U.S. 240; *Schlagenhauf v. Holder,* 379 U.S. 104.

There is nothing in the new rule adopted below, or in this Court's Rule 31(3), which condemns the practice in question. Such a rule seeks to avoid the problem created by the practice by realigning the parties, making it unnecessary for the judge to be represented if he does not so desire. But there is no basis for assuming that such representation, particularly one that arose before promulgation of the new rule, must be deemed to be outlawed or to justify disqualification.

The fact that the Third Circuit in *Rapp v. Van Dusen,* 350 F. 2d 806, promulgated a similar rule and then applied it retroactively to disqualify Judge Van Dusen constitutes no conflict with the determination below not to disqualify Judge Watkins. With reference to new procedural rules and new legal principles, a court "should avoid retroactivity as much as possible". *Addison v. Holly Hill Co.,* 322 U.S. 607, 620. Retroactivity, "even when permissible, is not favored," *Claridge Apts. Co. v. Commissioner,* 323 U.S. 141, 164. Thus, only the most compelling circumstances, outweighing the inequitableness implicit in retroactivity (*United States v. Lindsay,* 346 U.S. 568, 571), war-

rant retroactive use of a new rule. See *Johnson v. New Jersey*, 384 U.S. 719, 728-729.

Any determination to utilize a new rule retroactively must accordingly take into account the foregoing principles and must rest within the sound discretion of the promulgating court. See *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203. That discretion was exercised by the Third Circuit in *Rapp v. Van Dusen* in favor of retroactivity by virtue of the peculiar circumstances there present, it being clear that retroactivity at the pretrial stage visited no harm or injustice on any of the parties. 350 F. 2d at 814. But in the instant case, the Fourth Circuit was confronted with entirely different circumstances.[3] To disqualify Judge Watkins now would vitiate the lengthy trial record, including testimony of witnesses no longer available, and would destroy an enormous expenditure of time, effort and money by all parties in the case and by the District Court. Moreover, the effort to disqualify Judge Watkins comes long after the facts concerning his actions with respect to the prior mandamus petitions were first known to petitioner; and the effort itself represents but another attempt "to have this case in one way or another consolidated with the Cleveland case and tried there." Indeed, it may be said that petitioner is not so much concerned with "the appearance of impropriety" as with avoidance of trial and judgment by Judge Watkins.

In light of all these factors and in view of the complete absence of any improper action by Judge Watkins, the

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[3] In the *Van Dusen* case the question involved the disqualification of a judge with respect to reconsidering, by direction of this Court, the very motion that had given rise to the prior mandamus. In the instant case the rulings made by Judge Watkins were not the subject of remand for further consideration but were affirmed by the Fourth Circuit with petitions for certiorari denied in this Court.

Fourth Circuit reasonably concluded that its new rule should not be retroactively applied for disqualification purposes. Faced with the same circumstances, the Third Circuit would probably have reached the same conclusion. Thus, becomes apparent the absence of any real conflict between the Circuits that would justify review by this Court. The differing results stemmed not from differing principles but from differing circumstances, warranting differing application of the respective discretionary powers in the interest of justice.[4]

Indeed, even if the Fourth Circuit's rule of court were in conflict with the Third Circuit's rule, no ground for certiorari here exists. Differing procedural rules of the Circuits or differing interpretations or applications of a similar rule in effect in more than one Circuit have never been thought to create a basis for review or correction by this Court. Unless there is some Constitutional right at stake or unless there is some overpowering consideration involving the proper administration of justice in the Federal Courts at issue, appellate courts are free to adopt or apply their own distinctive rules of practice, differing though they may be. Uniformity comes only through voluntary action by the respective appellate courts or by the adoption of the proposed Uniform Rules of Federal Appellate Procedure.

Petitioner's complaint in this Court literally reduces itself to an assertion that it should secure the "benefits" of the new rule as a reward or "incentive" for having brought a mandamus action resulting in the promulgation of the

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[4] There is, of course, no conflict between the decision below and *Texaco, Inc. v. Chandler*, 354 F. 2d 655 (C.A. 10), in connection with the retroactive application of a new rule of the type here involved. The Tenth Circuit has promulgated no such rule and disqualification was there ordered under the provisions of 28 U.S.C. §455.

rule (Pet. pp. 10-11). Aside from the question as to whether disqualification was meant to be one of the "benefits" of the rule, disqualification is too serious a matter to be regarded as a reward or incentive for any private party. Certainly a desire for an incentive cannot qualify as grounds for review by this Court.

2. No important question or conflict of decision is involved in the Fourth Circuit's interpretation of 28 U.S.C. §455

There is no occasion to review the Fourth Circuit's determination that 28 U.S.C. §455 "is directed primarily at the Judge who was of counsel in a case before his appointment to the bench." The Third Circuit in *Rapp v. Van Dusen, supra,* expressly refrained from passing upon §455 or basing disqualification of Judge Van Dusen upon that provision. And the §455 disqualification in *Texaco, Inc. v. Chandler,* 354 F. 2d 655 (C.A. 10), turned upon entirely different facts, counsel for one of the litigants representing the District Judge not in a mandamus action but in a concurrently pending private damage suit. There is thus no real or even claimed conflict over the interpretation of §455 relative to a District Judge's defense of his legal actions in mandamus suits.

The Fourth Circuit's interpretation of §455 is so plainly correct in the circumstances of this case as to leave no important question worthy of this Court's review. Obviously, a District Judge who did no more than follow a long-established custom of designating an attorney for the prevailing litigant to represent him in a mandamus assault upon his judicial actions is not "of counsel" to that litigant; nor is he necessarily so connected with that party or its attorney as to render it improper for him to sit on the trial.

Proof of those conclusions is to be found in the extended history of just such representations in mandamus proceedings without the slightest question ever having been raised as to any resulting disqualification, under §455 or any other provision of law. As already indicated, pp. 9, 11, *supra*, many mandamus cases have reached this Court wherein District Judges have been represented by counsel for the prevailing parties. So well established was that practice that it has been said that in such cases "the judge or court is *normally*, though not necessarily, represented by counsel for the party opposing the petitioner below, who is, of course, the real opposing party." Stern and Gressman, Supreme Court Practice, Sec. 10-8, pp. 328-329 (3rd ed. 1962) (emphasis added). And that normal practice flourished and developed while §455 was an integral part of the United States Code; indeed, §455 was reenacted as late as 1948, long after the practice in question had been established. See *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222, 225-228.

In short, nothing in the language or history of §455 suggests that it was designed to affect this established procedure which many District Judges have felt compelled to follow. The new procedure merely gives the District Judges an opportunity to avoid the unfortunate aspects of seeking representation in situations where they are not real parties in interest. But the new rule in no way reflects upon the propriety of the old practice or effects any amendment to §455.

Disqualification in this case thus must depend upon an assessment of the peculiar circumstances involved. That assessment has been made by the Fourth Circuit, and no reason has been suggested why this Court should review that court's conclusion that there is no justification for disqualifying Judge Watkins. The soundness of that con-

clusion is in no way diluted by petitioner's frivolous due process claim, premised upon *In re Murchison*, 349 U.S. 133, a case involving an entirely different situation. The representation of Judge Watkins having been fully explained by him and having been found to contain no elements of impropriety, further inquiry into the details of that representation can hardly rise to the level of a constitutional right.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 393

THE GENERAL TIRE & RUBBER COMPANY,
Petitioner,

vs.

THE HONORABLE R. DORSEY WATKINS, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MARYLAND,
Respondent,

and

THE FIRESTONE TIRE & RUBBER COMPANY,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY TO BRIEF FOR THE INTERVENOR IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Intervenor's brief in opposition misstates the issues and some of the facts. This brief will attempt to rectify only the more important misstatements.

The Improved Practice in the Third and Fourth Circuits Came Only as a Result of Proceedings Brought by Litigants.

In the Court of Appeals, Firestone intervened without opposition, vigorously defended the *ex parte* conferences between the District Judge and counsel for Firestone, and opposed *any* change in the Rules for mandamus proceedings. Now, Firestone applauds the opinion below for changing the mandamus procedure and prohibiting the District Judge's use of and collaboration with counsel for one of the parties. Firestone says, however, that Rule 20(b) of the proposed Uniform Rules of Federal Appellate Procedure, when and if adopted, would accomplish this same result, even if General had not raised the issue by this proceeding. This is simply not the fact. Proposed Rule 20(b) is at best ambiguous in stating that "[r]espondents may answer jointly." (Intervenor's brief, p. 10.) Since the judge is still a respondent, it could be argued that Rule 20(b) would permit joint answers, and by inference, joint conferences, *ex parte*. Indeed, Firestone so argued before the Court of Appeals.

The beneficial changes in the Third and Fourth Circuits are the result of proceedings brought by litigants. There is no indication there would have been or will be such changes otherwise. Thus, it is important that the incentive for bringing such remedial proceedings not be destroyed by denying relief to the complaining party:

The Facts in This Case Add to the Appearance of Impropriety.

Firestone contends that the Court below found no impropriety in the judge's retaining and conferring *ex parte* with counsel for one of the parties in the mandamus proceeding, *per se*. The Court did find and hold that this conduct, *per se*, led to the appearance of impropriety, however, and banned the conduct in the future. The following facts in this case add to the appearance of impropriety and the inherent unfairness of *ex parte* consultations:

(a) An affidavit of personal bias or prejudice is in the parent litigation making the appearance of impropriety a very sensitive factor. *Firestone Tire & Rubber Co.* v. *General Tire & Rubber Co.*, 140 U. S. P. Q. 124 (D. C. Md., 1963).

(b) Judge Watkins attempted to interject the affidavit of prejudice into the jury trial mandamus proceeding by requesting the Court of Appeals to "consider and pass upon" its adequacy (Pet., p. 7).[1] The Court of Appeals refused the request. Mr. Howard had conferred with the Judge prior to the filing of this request (Pet., p. 7).

(c) Judge Watkins did not follow the custom in the District of Maryland of using the District Attorney as counsel in mandamus proceedings as he was advised by the Chief Judge, but chose one of the counsel for Firestone. (Pet. App. p. 12a.)

(d) Judge Watkins says that Mr. Howard, counsel for Firestone, made at least one unauthorized statement in his alter ego as the Judge's counsel before the

1. Throughout this brief, Pet. p. .... refers to petition for certiorari; Pet. App. p. .... refers to the appendix of the petition for certiorari; and Supp. App. p. .... refers to the Supplemental Appendix filed by petitioner in the Court of Appeals.

Court of Appeals (Pet. App. p. 13a). Mr. Howard also admittedly carried his argument for the Judge into areas where he was speaking for Firestone (Supp. App. p. 6).

(e) General does not know and cannot find out all that may have happened in relation to the *ex parte* collaboration between Mr. Howard and Judge Watkins. Before Judge Watkins' statement of December 16, 1965, in response to a question from counsel for General, General had no operative knowledge of the *ex parte* conferences. *In re Murchison*, 349 U.S. 133 (1955) is directly in point.

(f) Mr. Howard prepared the Judge's response to the transfer mandamus and then, as counsel for Firestone, adopted the "Judge's" response as part of Firestone's intervening brief (Pet., p. 7).

Petitioner Does Not Request Retroactive Application.

Firestone refers to General's petition as a request to have the Court of Appeals' decision applied retroactively. This is a false issue. The petition is *not* a request for retroactive application. This case has not gone to final judgment; it is still at trial. Even if the Court of Appeals' decision is to be applied *in futuro*, it should apply to the future trial of this case. Petitioner is asking only that the *normal* procedure be followed of applying any new rule to the case in which it is promulgated.

In *Rapp* v. *Van Dusen*, 350 F. 2d 806, 814 (3rd Cir. 1965) the Court said, "There is no reason why the beneficial purpose of this procedure should not extend to the present cases." This language was quoted by the Fourth Circuit, but that Court did not extend relief to General and gave *no* reasons for not doing so.

Disqualification Would Not Result in Loss of Testimony Already Taken.

Firestone's repeated argument concerning the amount of trial time which would be wasted and "key witnesses" who would be lost if the District Judge were disqualified are attempts to raise other false issues. Firestone says that trial is " 'hopefully' nearing completion." (Intervenor's Brief, p. 2). General is not at all sure the trial is "nearing completion," but significantly, the testimony of the "key witnesses" already taken would *not* be lost and would be usable at another trial.

Insofar as the disqualification of Judge Watkins would delay the trial, this case is no different than any other proceeding in which trial is delayed, or, in the case of reversal, tried anew. The pre-trial in *Rapp* v. *Van Dusen, supra,* continued at least three years before Judge Van Dusen was disqualified.

CONCLUSION.

In summary, General contends that for the reasons set out in its main brief, this petition should be granted and the case either summarily remanded for disqualification of the District Judge, or remanded for disqualification pursuant to 28 U. S. C. § 455, after hearing.

Respectfully submitted,

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